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In the

Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities; THOMAS C. HORNE, Super. of Public Instruction,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF APPENDICES

Appendix A — Opinion of the United States Court of Appeals as Amended on Denial of Rehearing and Rehearing En Banc Dated and Filed April 17, 2008 ..... 1a

Appendix B — Ninth Circuit Order Amending Opinion and Denying Petition for Rehearing En Banc Dated and Filed April 17, 2008 ..... 92a

Appendix C — Order of the United States District Court for the District of Arizona Dated and Filed March 22, 2007 ..... 96a

Appendix D — Findings of Fact and Conclusions of Law of the United States District Court for the District of Arizona Dated and Filed January 24, 2000 ..... 117a

Appendix E — Judgment of the United States District Court for the District of Arizona Dated and Filed January 24, 2000 ..... 154a

Appendix F -- Order of the United States District Court for the District of Arizona Dated and Filed December 15, 2005 ..... 155a

Appendix G — Order of the United States District Court for the District of Arizona Dated and Filed March 14, 2006 ..... 175a

Appendix H — Order of the United States District Court for the District of Arizona Dated and Filed April 25, 2006 ..... 176a

Appendix I — Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit Dated and Filed July 25, 2006 .....188a

Appendix J — Order of the United States District Court for the District of Arizona Dated and Filed January 5, 2007 .....191a

Appendix K — Selected Provisions of the No Child Left Behind Act, 20 U.S.C. 6301 *et seq*..193a

Appendix L — Arizona House Bill 2064, codified as Arizona Rev. Stat. § 15-756 *et seq*.....268a

Appendix M — Rule 60(b) of Federal Rules of Civil Procedure 335a

Appendix N — Selected Excerpts and Exhibits from Evidentiary Hearing Held by the United States District Court for the District of Arizona.....336a

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRIAM FLORES, individually and as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child,
Plaintiffs-Appellees,
v.

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities,
Defendants-Appellees,

THOMAS C. HORNE, Superintendent of Public Instruction,
Defendant-Appellant,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,
Intervenors.

No. 07-15603

D.C. No.
CV-92-00596-RCC

Appendix A

MIRIAM FLORES, individually and
as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI,
individually and as a parent of Mario Rzeslawski, minor child,
Plaintiffs-Appellees,

v.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Intervenors-Appellants,
and

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities, THOMAS C. HORNE, Superintendent of Public Instruction,

Defendants.

No. 07-15605

D.C. No.
CV-92-00596-RCC
OPINION

Appendix A

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
December 4, 2007—San Francisco, California

Filed February 22, 2008

Before: Betty B. Fletcher, Marsha S. Berzon, and
Johnnie B. Rawlinson, Circuit Judges.
Opinion by Judge Berzon

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OPINION

BERZON, Circuit Judge:

On January 24, 2000, the District Court for the District of Arizona ruled that Arizona was violating the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.* ("EEOA"), because the state's funding for English language instruction for non-native speakers was "not reasonably calculated to effectively implement the . . . educational theory which" the state had approved. *Flores v. Arizona*, 172 F.Supp.2d 1225, 1239 ("*Flores II*") (D. Ariz. 2000). Eight years later, Arizona has still not satisfied the terms of that judgment, nor complied with the bulk of the injunctions entered against it as a result of that ruling. Although Arizona and the Arizona Board of Education acknowledge that the state remains out

of compliance and do not seek to vacate the judgment or the injunctive orders, the Arizona Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate moved for relief from judgment.[1] We affirm the district court's denial of relief.

I. BACKGROUND

It has been more than fifteen years since the initial complaint in this action was filed and eight years since the final judgment on liability issued. The post-judgment relief process has been arduous, with Arizona moving forward, to the considerable degree it has, largely in response to a consent decree resulting from this litigation and a series of post

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[1] The Arizona School Boards Association, Tucson Unified School District, Mesa Unified School District, Sunnyside Unified School District, and Phoenix Union High School District filed an amicus brief supporting Arizona, the Board of Education, and the plaintiffs. They emphasize the many pedagogical challenges districts face in attempting to educate students who are not fluent in English and the substantial resource costs those hurdles create. In their view, "Arizona school districts have performed an admirable job of educating [English language learner] students despite being grossly under-funded by the State. School districts are already stretched to their limits both economically and in terms of morale and personnel. They will continue to struggle to provide quality [programs for such students] without additional assistance and resources from the State." They further note that "Arizona school districts cannot divert general education funding to . . . programs [for such students] without seriously crippling school districts' ability to provide all other aspects of a public education."

judgment relief orders. Over this long period, local and national conditions have shifted in significant ways. The moving parties contend they have done so sufficiently as to warrant relief from judgment, even though Arizona has never complied with the specific terms of the present injunction against it. Explaining why that argument fails requires rehearsing the history of this case. We do so here, beginning with the complaint and Declaratory Judgment, moving through the intermediate post judgment orders, and then discussing in detail the proceedings leading up to this case, which were triggered by a new state funding statute and resulted in an eight-day evidentiary hearing.

A. The EEOA and the Complaint

Nogales is a small city along the Mexican border in southern Arizona. In 1992, when this suit began, the population of the Nogales Unified School District ("NUSD") was almost entirely Hispanic; that is still so. Most of its approximately 6,000 students come from homes where Spanish is the first language. These students are distributed among six elementary schools, two middle schools, one high school, and one alternative high school. The great majority of the district's students are classified as English language learners ("ELL") for at least some portion of their academic careers. In 2006, for instance, thirty percent of the students were in ELL programs and an additional sixty percent had been in such programs. Although Arizona's theory of ELL instruction has changed over the years, the

enormous importance of such programs to students and parents in Nogales has not.

ELL students and parents in Nogales (we refer to them as "Flores," after class representative Miriam Flores), were faced with serious inadequacies in ELL instruction and sued to correct them. The suit proceeded as a class action, with the class defined as "all minority 'at risk' and limited English proficient children now or hereafter, enrolled in Nogales Unified School District . . . , as well as their parents and guardians."

Flores' second amended complaint, filed November 29, 1996, primarily alleged that the "State has failed to provide financial and other resources necessary for adequate implementation of mandatory [ELL] programs by public school districts in Arizona," because "[t]he cost of [ELL] instruction complying with federally prescribed state mandates far exceeds the only financial assistance the State theoretically provides school districts for such purposes." As a result, Flores contended, Arizona, the state Superintendent, and the state Board of Education violated the EEOA.

The relevant portion of the EEOA provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede

> equal participation by its students in its instructional programs.

20 U.S.C. § 1703. This provision of the EEOA was intended to remedy the linguistic discrimination identified by *Lau v. Nichols*, 414 U.S. 563 (1974), in which the Supreme Court held that failing to provide for the needs of non-English speaking students "is to make a mockery of public education," rendering classroom experiences for these children "wholly incomprehensible and in no way meaningful." *Id.* at 566; *see also Castaneda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981) (noting that the EEOA codifies the "essential holding of *Lau*, *i.e.*, that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district.").[2]

Flores alleged that such needs were not being met in Arizona. She charged Arizona with "administer[ing] a school finance scheme that is just sufficient to let less distressed, predominantly Anglo districts impart State-mandated essential skills to

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[2] The EEOA contains an express private right of action, 20 U.S.C. § 1706, under which this suit proceeds. *See Flores v. Arizona*, 48 F. Supp. 2d 937, 940 ("*Flores I*") (D. Ariz. 1999) (holding that the plaintiffs could proceed under § 1706). We have held that § 1706 abrogates state sovereign immunity. *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 950-51 (9th Cir. 1983); *see also Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1037-38 (7th Cir. 1987) (same). Arizona does not contend otherwise.

their mainstream student bodies . . . but that does not and will not enable NUSD or similarly situated districts to impart the same State-mandated essential skills to decisively minority enrollments requiring expanded compensatory programs, smaller class sizes and further efforts of like nature in order to acquire them."

Flores' complaint was premised on the EEOA analytic framework provided by the Fifth Circuit in *Castaneda*. *See* 648 F.2d at 1009-10; *see also Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987) (applying the *Castaneda* analysis). The *Castaneda* framework is three-fold: First, courts must be satisfied that the "school system is purs-[uing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1010. There must, in other words, be sufficient "practices, resources and personnel . . . to transform the theory into reality." *Id.* Third, even if theory is sound and resources are adequate, the program must be borne out by practical results. *Id.* Flores alleged, consistent with *Castaneda* step two, that Arizona had "failed to provide financial and other resources necessary for adequate implementation" of its ELL programs.

B. The Declaratory Judgment and Arizona's School Funding System

After lengthy pre-trial proceedings and a bench trial, the district court on January 24, 2000, held that Arizona was in violation of the EEOA and granted declaratory judgment in Flores' favor.[3] *See Flores II*, 172 F. Supp. 2d at 1239. Of the many issues raised in Flores' complaint, only one EEOA issue was decided by the court: "[W]hether or not Defendants' [sic] adequately fund and oversee the *Lau* program in NUSD . . . ."[4] *Id.* at 1226. The rest of the EEOA violations originally alleged, including failures adequately to evaluate and monitor ELL students, to provide tutoring and other forms of compensatory instruction, and to design successful ELL programming, were covered by a consent decree approved by the district court on July 31, 2000. *See id.*

The particulars of Arizona's school funding system are therefore at the heart of this case. We pause to describe them here.

Consistent with Article XI, § 1 of the Arizona Constitution, school funding in Arizona is designed to be essentially equal across districts, despite

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[3] The earlier proceedings, which involved changes of counsel on both sides and various other procedural hurdles and delays, are summarized in *Flores I*, 48 F. Supp. 2d at 943-46.

[4] Because 20 U.S.C. § 1703(f) codifies the central holding of *Lau*, ELL programs are sometimes referred to as "*Lau* programs."

differences in local property values. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811-16 ("*Roosevelt I*") (Ariz. 1994).[5] To ensure equality, the state calculates the maximum support level a district may spend, referred to as the revenue control limit, *see* ARIZ. REV. STAT. § 15-947, and then pays the difference between that level and the amount the district can raise by levying a state-mandated tax rate against property in its area, *see* ARIZ. REV. STAT. § 15-971. Thus, regardless of the local tax base, the amount each district can spend per pupil is roughly equalized statewide, by first setting a maximum spending level and then making up the gap between local tax revenues and that level with state funds.[6]

The revenue control limit, and hence the district support level, is calculated by adding together funds designated for transporting students to school, *see* ARIZ. REV. STAT. § 15-945, and "base support" funds, *see* ARIZ. REV. STAT. §§ 15-943, 944. It is these base funds with which we are primarily concerned.[7] These funds are unrestricted—school

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[5] Article XI, § 1 provides in pertinent part that "[t]he Legislature shall enact such laws as shall provide for the establishment and maintenance of a *general and uniform* public school system." (Emphasis added).

[6] School districts may also try to pass ballot measures, called "overrides," to raise county taxes and so secure funds above the revenue control limit. *See* ARIZ. REV. STAT. § 15-481.

[7] These funds, along with other federal, state and county funds, including funds provided to support ELL students, are

(Continued...)

districts may spend them essentially as needed—and do not appear to have been calibrated "to any minimum amount necessary for a basic education." *See Roosevelt I*, 877 P.2d at 810. Nonetheless, they represent the core funding provided for such an education.

Funding allocations are made by using a weighting system: A per pupil weighted amount of funding is calculated by multiplying a "support level weight" (which varies by district type and size and by the student's grade level) by a statewide baseline amount. *See* ARIZ. REV. STAT. §§ 15-943(1)(a)-(2)(a) (weights), 15-901(B)(2) (baseline). For the 2006-2007 school year, for instance, the statewide baseline amount was $3,133.53. ARIZ. REV. STAT. § 15-901(B)(2)(a). The support level weight for a typical student in grade eight in most school districts is 1.158, ARIZ. REV. STAT. § 15-943(2)(a), so a district could spend $3,628.63[8] to support that student in 2006-2007.

Not all students are "typical," of course. Some have special needs which impose additional, incremental costs. ELL students, for example, naturally require additional support. Arizona's funding formula provides for these incremental costs

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sometimes referred to as "maintenance and operation" or "M & O" funds. *See Savage v. Glendale Union High Sch. Dist No. 205*, 343 F.3d 1036, 1041 (9th Cir. 2003).

[8] This figure is the product of the support level weight (1.158) multiplied by the baseline amount ($3,133.53).

through an additional "Group B" weighting system which adds additional funding for various student groups, including ELL students. *See* ARIZ. REV. STAT. § 15-943(2)(b). In 2006-07, for instance, the Group B weight for ELL students was 0.115, so a district received an *additional* $360.36[9] to cover the ELL component of that student's education, on top of the base level $3,628.63 provided for each pupil.

The core assumption of Arizona's funding formula, then, is that ELL students impose *incremental* costs on a district, above the base level funding allocation. So, while all of the funding (base level and Group B weights) is allocated to the district as a block grant, a district that spends more on ELL incremental costs than allocated is necessarily spending less on basic educational needs per pupil.

Taking this framework as a given, the district court in its 2000 declaratory judgment opinion inquired whether Arizona's funding specifically for ELL students — the Group B weights — actually covered the incremental costs of ELL programming. The court found that it did not. *Flores II*, 172 F. Supp.2d at 1239.

This finding was well supported. Arizona had conducted a cost study in 1987-88 which determined that school districts were spending about $450 (in 1988 dollars, unadjusted for inflation) per ELL student. *Id.* at 1228. This study was seriously

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[9] This figure is the product of the Group B weight (0.115) multiplied by the baseline amount ($3,133.53).

methodologically flawed; it did not, for instance, determine what districts *should* be spending. But even by the study's flawed measure, Arizona's ELL funding was inadequate on a statewide basis. Twelve years after the study, the district court found, Arizona's ELL Group B weight, 0.60, provided only about $150 per student. *Id.* at 1238-39.

That this support was inadequate to live up to Arizona's EEOA obligations to its school districts and their students was supported by several examples of resource-linked ELL program deficiencies in NUSD, including:

> 1) too many students in a class room,
>
> 2) not enough class rooms,
>
> 3) not enough qualified teachers, including teachers to teach [English as a Second Language] and bilingual teachers to teach content area studies,
>
> 4) not enough teacher aids,
>
> 5) an inadequate tutoring program, and
>
> 6) insufficient teaching materials for both [English as a Second Language] and content area courses.

Id. at 1239.

In short, Arizona's "minimum base level for funding Lau programs [was] arbitrary and capricious and [bore] no relation to the actual funding needed to ensure that [ELL] students in NUSD are achieving mastery of its specified 'essential skills.'" *Id.* In

particular, the court held, the ELL Group B weight appropriation was "not reasonably calculated to effectively implement" the ELL programs, and Arizona had, therefore, "failed to follow through with . . . resources . . . necessary to transform theory into reality," as the *Castaneda* framework requires."[10] *Id.*; *see Castaneda*, 648 F.2d at 1010.

C. Post-Judgment Relief and Arizona's ELL Programs

The judgment was not appealed. Nonetheless, Arizona did not take action to eliminate the violations found in the Declaratory Judgment. Instead, the state legislature defeated several attempts to commission an adequate study of ELL costs that would enable it to set appropriate ELL funding levels.

In October of 2000, ten months after the issuance of the Declaratory Judgment, the district court ordered Arizona to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs. *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1047 ("*Flores III*") (D. Ariz. 2000). Such a study was critical, the court indicated,

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[10] The district court was aware that base support funds could be diverted to ELL students if the target Group B weight funding is inadequate and a district so chooses. *Flores II*, 172 F. Supp. 2d at 1229. Because base level funds support typical students, the district court focused on the Group B weights, *see id.* at 1238, which are, again, the amount that Arizona projects will be necessary to spend *in addition* to the base level funds to meet the special needs of ELL students.

because "as a matter of law the State's minimum base level for funding *Lau* programs bears no relation to the actual funding needed to ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.'" *Id.* at 1044. This injunction was not appealed either.

Shortly after the injunction issued, in November 2000, Arizona voters approved two propositions that altered Arizona's school funding and ELL programs. Proposition 203 largely abolished bilingual education, replacing it with sheltered English immersion, a teaching method "in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language." ARIZ. REV. STAT. § 15-751(5). Proposition 301 increased school funding generally in Arizona through a sales tax increase. *See* ARIZ. REV. STAT. § 15-901.01. Prop. 301 funding is available for many purposes but is not directed specifically towards ELL programs. *See* ARIZ. REV. STAT. § 42- 5029(E)(1)-(10).

Meanwhile, as ordered, Arizona commissioned a cost study (we refer to it as the "SjobergEvashnek study," after the consulting group that largely directed it). The final study, however, proved to be a disappointment. It did not estimate the incremental costs of EEOA compliance, but instead reported on what several districts nationwide were spending. The study reported widely variable incremental costs for various ELL programs, ranging from about $185 to $3,000 per ELL student. It also found that NUSD was spending $331.60 in incremental costs per pupil,

while noting that the NUSD program might not "fully address the unique and extraordinary needs of [NUSD's ELL] population."

Some additional guidance came from a study conducted by the staff of several Democratic members of the legislature (the "Staffers' study"), also released in 2001. Aggregating data from other states and from Arizona, the Staffers' study estimated $1527 in incremental costs per student would be required for EEOA compliant programs—a number, it noted, which was generally consistent with the experience of other states.

Arizona did not act on either study. After Flores again moved for post-judgment relief, the court, on June 25, 2001, restated its holding that "as a matter of law the State's minimum base level for funding *Lau* programs" was not rationally linked to "funding needed to ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.'" *Flores v. Arizona*, No. CV-92-596, 2001 WL 1028369 at *1 ("*Flores IV*") (D. Ariz. 2001). It ordered Arizona to provide funding that "shall bear a rational relationship to the actual funding needed" by no later than January 31, 2002. *Id.* at *2. This injunction, too, was not appealed.

The legislature responded by enacting HB 2010 on December 19, 2001. That law increased the ELL Group B weight to 0.115, which generated, at that time, about $339.61 per student, roughly the amount that NUSD was recorded as spending in the SjobergEvashnek study. HB 2010 also provided funds for a more comprehensive cost study than had

been done previously. Contending that HB 2010 was not adequate, Flores again moved for post-judgment relief.

Initially, the district court agreed with Flores. It held, in an order issued on April 8, 2002, that the $339.61 in base level funding was not adequate because it was based on NUSD's *actual* spending (as of 2001), which generated "the very program that this Court's Declaratory Judgment held to be deficient." *Flores v. Arizona*, No. CV-92-596 at 3 ("*Flores V*") (D. Ariz. 2002). A few months later, however, the court reconsidered, on Arizona's motion, and held that HB 2010's funding levels were adequate "as an interim measure pending further study and review," including the cost study funded by HB 2010. *Flores v. Arizona*, No. CV-92-596 at 1-2 ("*Flores VI*") (D. Ariz. June 12, 2002). The order was not appealed, and three years passed.[11]

Again, the legislature gathered some data and, again, it did not act upon the data it received. As part of HB 2010, the legislature commissioned a detailed cost study from the National Conference of State Legislatures (the "NCSL study"). NCSL

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[11] Among the events of those years was another general school funding increase. In November 2002, Arizona voters approved Proposition 202, which dedicated a portion of the state's share of Indian casino gambling proceeds to a school improvement fund for teacher compensation, class size reduction, dropout prevention, and instructional improvement programs. *See* ARIZ. REV. STAT. §§ 5-601.02(H)(3)(b)(I); 15-979. None of these monies are specifically directed to ELL programs.

submitted a first draft in August 2004 and a second draft in February 2005, upon which we rely. The study used two approaches: A survey sent to Arizona school districts to determine then-current ELL program spending and two expert panels, one of state and one of national experts, convened to estimate the costs of EEOA-compliant ELL programs.

The school district survey was hampered by a small response rate — only seven of the sixteen surveyed districts provided data. NCSL noted the problem but analyzed the available data, which showed an average expenditure of $669.35 per pupil in incremental costs. NCSL cautioned that this data was limited and of questionable quality, noting that the cost figure might be "somewhat understated."

Expert estimates of appropriate (rather than actual) spending were significantly higher. The national expert panel recommended a range of spending, based on the degree of students' need for help and grade level from $1,026 per pupil for low-need students at the high school level to $2,571 for high-need elementary school students. The state expert panel recommended spending $1,785 in per pupil incremental costs in grades K-2 and $1,447 in grades 3-12.

Again, Arizona did not act to bring its system into line with either set of cost data. Again, Flores

moved for post-judgment relief.[12] On January 28, 2005, the court set an April 30, 2005 deadline for Arizona to "appropriately and constitutionally fund [ ] the state's ELL programs taking into account the Court's previous orders." *Flores v. Arizona*, No. CV-92-596 at 5 ("*Flores VII*") (D. Ariz. 2005).

D. The First Contempt Order and HB 2064

Arizona failed to act before the deadline. Flores moved for sanctions. On December 15, 2005, deploring the fact that "[t]housands of children who have now been impacted by the State's inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case," the court held that Arizona was in civil contempt. *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1113, 1119 ("*Flores VIII*") (D. Ariz. 2005). It set a deadline of fifteen days after the start of the 2006 legislative session for compliance with its order, and imposed a schedule of fines that would begin to accrue if Arizona did not act and that were to be distributed to Arizona schools to support ELL students. *Id.* at 1120-21; *see also* Order re: Distribution of Fines, No. CV-92-596 (D. Ariz. March 16, 2006).

Arizona did not enact compliant legislation and accrued over $20 million in fines. Eventually, in the spring of 2006, Arizona Governor Janet Napolitano

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[12] Not long before this motion was filed, the litigation was transferred from Senior District Judge Alfredo C. Marquez, who had handled it from the outset, to District Judge Raner C. Collins.

allowed HB 2064, the legislature's effort to create a permanent compliant funding system, to become law without her signature.[13]

HB 2064 is consistent with Arizona's "base costs plus Group B weights" approach to education funding, but includes some additional ELL funds designed to cover incremental costs above Group B weight levels, although there are no guaranteed appropriations for these funds. Along with this funding structure, the statute provides for further statewide standardization of ELL programs, presumably in part to make it possible for the state more easily to monitor and assess the impact and use of allocated funds and the need for additional funds.

To drive the standardization process, HB 2064 creates the "Arizona English language learners task force" within the state Department of Education. *See* ARIZ. REV. STAT. § 15- 756.01. The task force is "to develop and adopt research based models of structured English immersion programs for use by school districts and charter schools." *Id.* at § 15-756.01(C).[14] Each school district and charter school is to adopt one of the models or request a waiver. *See* ARIZ. REV. STAT. § 15-756.02. To aid in implementing the models, HB 2064 also creates an

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13 Governor Napolitano's statement on HB 2064 appears later in this opinion.

14 The models are "limited to a regular school year and school day," *id.* at § 15-756.01(E), and do not provide guidance for after-school and summer school programs.

"Office of English language acquisition services," which is to develop guidelines for monitoring ELL students and programs, create teacher training programs, and provide other forms of technical assistance. *See* ARIZ. REV. STAT. §§ 15-756.07, 15-756.08. Finally, the state Board of Education is charged with developing a structured English immersion "endorsement" program for use in training and certifying Arizona's teachers. *See* ARIZ. REV. STAT. § 15-756.09.

The models, and ELL education generally, are funded by three mechanisms under HB 2064, representing significant potential increases in ELL funding but coming with significant limitations:

First, HB 2064 raises the Group B weight for ELL students from 0.115 to 0.140, which corresponds to an increase from about $340 per student to about $450 per student. *See* HB 2064 § 6, to be codified at ARIZ. REV. STAT. § 15-943(2)(b).[15] There is, however, a significant cut-back as well: Unlike earlier Group B weight funding, under HB 2064 Group B "funding for the same ELL pupil shall not be provided for more than two fiscal years." HB 2064 § 6.

Second, HB 2064 establishes the "Arizona structured English immersion fund," which provides supplemental funds above the Group B weights to implement the models. *See* ARIZ. REV. STAT. § 15-

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[15] As we note below, this increase is not yet in effect.

756.04. Those funds come, however, with several restrictions. Like the Group B weights, they are limited to two years of availability for any one student. ARIZ. REV. STAT. § 15-756.01(J). And only "incremental costs" of the programs are funded, which are defined as those "in addition to the normal costs of conducting programs for English proficient students," *id.* at § 15-756.01(L), and which do not include "compensatory instruction." "Compensatory instruction" consists of "programs in addition to normal classroom instruction . . . [which] are limited to improving the english proficiency of current english language learners and pupils who were english language learners and who have been reclassified as english proficient within the previous two years." ARIZ. REV. STAT. at § 15-756.11(G).

In addition, the amount of money provided by the structured English immersion fund is offset by the following funding sources:

> 1. All federal title III monies and any other federal monies designated solely for the educational needs of english language learners.
>
> 2. The portion of title I and title II A monies determined by the english language learner population as a percentage of the qualified population.
>
> 3. The portion of impact aid monies determined by the english language learner population as a percentage of the qualified population. A school district or charter school

> shall only apply unexpended impact aid monies to english language learner programs after it has applied its impact aid monies for other allowable uses as permitted by state law.
>
> 4. The portion of [monies the district may levy to further desegregation efforts pursuant to ARIZ. REV. STAT.] § 15-910 . . . determined by the english language learner population as a percentage of the qualified population.
>
> 5. The ELL [Group B] weight . . . .

ARIZ. REV. STAT. § 15-756.01(I)(1)-(5). At the same time, HB 2064 provides that "[m]onies from the fund [are to be used] . . . to supplement existing programs for english language learners . . . . [and] shall not be used to supplant available monies used to pay for the normal costs of conducting programs for english proficient students." ARIZ. REV. STAT. § 15-756.04(F).

Importantly, there is no guaranteed legislative appropriation for the structured English immersion fund. Instead, after school districts and charter schools submit budget requests, the Department of Education is to verify and "collect all . . . [the] requests and submit them to the [Arizona] legislature for funding." ARIZ. REV. STAT. § 15-756.03(C). The legislature is not required to appropriate any monies to fund such requests.

Third, HB 2064 establishes the "statewide compensatory instruction fund" to be used for compensatory instruction only. *See* ARIZ. REV.

STAT. § 15-756.11. These funds, too, come with a caveat: They "shall not be used to supplant any federal, state or local monies, including desegregation monies . . . , used for compensatory instruction that [had been] budgeted for english language learners as of February 23, 2006." *Id.* at § 15-756.11(E). In other words, the state funds provided must not replace any funds already in use for the same purpose. The total amount of funding is also limited. Although the legislature appropriated $10 million for this program for the 2006-07 fiscal year, no further appropriations are required by the statute. HB 2064 § 9.

HB 2064 was for the most part immediately effective. School districts and charter schools, however, could not adopt the models until they were developed, which they now have been. Also, monies for the structured English immersion fund do not have to be appropriated and to this point have not been. Most importantly, the provisions associated with the Group B weight increase, require court approval. In this regard, HB 2064 provides:

> [The Group B weight increase and appropriation to fund it, along with the two-year cut-off] do not become effective unless the United States District [C]ourt for the [D]istrict of Arizona in the case of [*Flores v. State of Arizona*] issues an order that, by this act, the state has taken appropriate action to establish a program that addresses the orders in the case and, at least on an

> interim basis, the court will permit this act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs.

HB 2064 § 15(A).

Although Governor Napolitano allowed HB 2064 to become law, she did so without vouching for its compliance with the 2005 court order or with the Declaratory Judgment. To the contrary, she announced that she was "convinced that getting this bill into court now is the most expeditious way ultimately to bring the state into compliance with federal law," and requested that the Attorney General move the court for expedited consideration of the law.[16]

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[16] Governor Napolitano's statement on the matter provides, in relevant part:

> I received House Bill 2064, related to [ELL] programs. I have decided to allow the bill to become law without my signature so that we can move this dispute to a different forum and get a ruling from the *Flores* Court as to its sufficiency. After nine months of meetings and three vetoes, it is time to take this matter to a federal judge. I am convinced that getting this bill into court now is the most expeditious way

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ultimately to bring the state into compliance with federal law.

. . . .

Although I am allowing House Bill 2064 to become law without my signature, I do not believe this bill meets either the Court's multiple orders or our existing consent decree. It fails in a number of important ways, including but not limited to:

- *Arbitrary Funding Level*: there is no reason to believe that the funding contained in House Bill 2064 bears any rational relationship to the actual cost of implementing a successful language acquisition program.

- *Failure to Ensure Academic Accountability*: the point of teaching children to speak, read and write in English is to allow them to succeed academically and to ultimately become contributing members of the workforce. This bill cuts off funding to students after two years, regardless of their academic progress and does not ensure ELL students would even be able to pass AIMS [Arizona's achievement test].

- *Failure to Determine Program Effectiveness*: rather than using respected experts to advise the state on best practices and the real costs of ELL instruction, House Bill 2064 instead creates a system by which political appointees with no required minimum qualifications make important educational policy decisions.

- *Unwise Creation of a New Bureaucracy and Excess Paperwork*: the bill adds an extra layer of government and does not focus on long-term student success.

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E. The First Relief from Judgment Ruling and the Remand

By this point, six years after the Declaratory Judgment, the positions of the parties had shifted, with Arizona and the state Board of Education abandoning their defense of the suit and largely siding with Flores. As a result, when, on March 3, 2006, the state Attorney General moved on behalf of Arizona for the court to consider whether HB 2064 satisfied its order, he was arguing *against* Arizona's own law.

The Superintendent, however, maintained his position and was joined by the Speaker of the Arizona House of Representatives and the President of the Arizona Senate as intervenors (we refer to them as the "Legislative Intervenors"). Later that March, these parties moved to purge contempt and, in the alternative, for relief from judgment under Rule 60(b)(5). Their joint motion was based largely on HB 2064, which, they contended, "creates a plan for adequate funding of programs for [ELL students]," and brings Arizona into compliance.

The district court disagreed, ruling on April 25, 2006, that HB 2064 does not comply with its orders or with the Declaratory Judgment because the "Act

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• *Violation of Federal Supplanting Laws:* the bill requires ELL payments to school districts and charter schools to be reduced by the amount of federal monies they receive, in violation of federal law.

does not [bear] any rational relationship to the cost of providing an ELL program . . . and it has added new hurdles to the mix." *Flores v. Arizona*, No. CV-92-596 at 3 ("*Flores IX*") (D. Ariz. 2006). The court held the Group B weight increase insufficient, and the two-year cut-off on most funds irrational. *Id.* at 7-8. The two new funds, moreover, were structured in ways that violated federal law. *Id.* at 4-7. The Superintendent and Legislative Intervenors appealed both that order and the December 2005 contempt order.

On August 23, 2006, in an unpublished memorandum disposition, this court vacated both orders as well as the obligation to pay fines. *Flores v. Rzeslawski*, 204 Fed. App'x. 580 ("*Flores X*")(9th Cir. 2006). The court noted that "the landscape of educational funding has changed significantly" since 2000 and remanded for the district court to hold "an evidentiary hearing . . . regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy." *Id.* at 582. The court made clear that it reached none of the other issues in the case. *Id.*

F. The Evidentiary Hearing

On remand, the district court held an eight-day hearing in January 2007. Testimony at the hearing focused on three broad areas: (1) HB 2064 and other changes in Arizona's ELL programming and funding; (2) conditions in NUSD; and (3) conditions in other school districts statewide. As the evidence adduced

in the hearing is at the core of our inquiry today, we summarize it in some detail here.

1. Statewide Changes

As is required by the *Flores* consent decree, Arizona has significantly improved its ELL infrastructure. It has also increased overall school funding and, to a lesser degree, ELL program-specific funding. Nonetheless, Arizona's 134,000 ELL students continue to lag behind statewide average test results for all students.

The new administrative structure created by HB 2064 augments Arizona's efforts to further improve and standardize ELL programs statewide. The state Department of Education holds regular seminars and training sessions and has developed monitoring protocols for school districts. State developed proficiency standards for ELL students are used to evaluate programs and to identify problems. Arizona has also made efforts to standardize the testing used to classify children as ELL or English proficient.[17] Perhaps most

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[17] Before 2004, Arizona allowed districts to select among four different tests to decide when to "reclassify" students out of ELL programs into mainstream classes. Beginning in 2004, Arizona instituted the Stanford English Language Proficiency Assessment ("SELP"), which was in use from 2004 through 2006. SELP was generally regarded as too easy to pass, and reclassification rates increased measurably during its use. Arizona fine-tuned SELP, renaming it the Arizona English Language Learner Assessment ("AZELLA"), and has been using the new test since the fall of 2006. The transition from SELP to

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importantly, after August 31, 2006, all classroom teachers, supervisors, principals, and superintendents are required to obtain an endorsement in ELL teaching methods. *See* ARIZ. REV. STAT § 15-756.09; ARIZ. ADMIN. CODE R7-2-613(J).

Along with these ELL-specific structural changes, Arizona has increased overall school funding.[18] On an inflation adjusted statewide basis, including all sources of funding, support for education has increased from $3,139 per pupil in 2000 to an estimated $3,570 per pupil in 2006. Adding in all county and local sources, funding has gone from $5,677 per pupil in 2000 to an estimated $6,412 per pupil in 2006. Finally, federal funding has increased. In 2000, the federal government provided an additional $526 per pupil; in 2006, it provided an estimated $953.[19]

AZELLA appears to have measurably decreased reclassification rates. As a result of these shifts in testing methodology, ELL reclassification rates are not easily comparable over the years.

[18] Broader state efforts for at-risk children generally benefit some ELL students. These efforts include several funding streams for tutoring programs. In one tutoring program, 88% of ELL students were able to raise their scores by one achievement level in at least one subject area of Arizona's standardized academic achievement tests; 92% of non-ELL students in the same program so raised their scores.

[19] Arizona has also significantly increased spending on school physical plant needs, largely in response to another class-action

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Appendix A

Arizona's ELL-specific funding increases are associated with HB 2010 and HB 2064. At the hearing, two important points concerning HB 2064 emerged: First, none of the defense witnesses were able to establish what data, if any, the Group B weights are based upon. The weights do not appear to have been set with regard to any specific program costs, known or estimated. Second, Flores' expert on federal educational funding statutes, Thomas Fagan, testified that if the federal government concluded that HB 2064 was in violation of federal statutes, it could take significant enforcement actions, including a cut-off of some or all federal education funds.[20]

Despite Arizona's expanded ELL infrastructure and budget, ELL students still achieve below - and often far below - state average passage rates on Arizona's "AIMS" academic achievement test and fall below the minimum passage rates Arizona must meet to reach the "annual measurable objectives" required by the No Child Left Behind Act of 2001 ("NCLB"), Pub. L. No.107-110, 115 Stat. 1425, as test results from the 2004-05 and 2005-06 school years show.[21] *See* 20 U.S.C. § 6842 (federal standards).

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suit. *See Roosevelt Elementary Sch. Dist. No. 66 v. Arizona*, 74 P.3d 258, 259-263 ("*Roosevelt II*") (Ariz. Ct. App. 2003).

[20] We discuss these potential violations and their consequences below.

[21] Standardized tests do not, of course, provide a full measure of a school's successes and failures. Educational quality is too complex to be reflected in a single score. But test scores do

(Continued...)

Appendix A

These test results must be viewed with two significant caveats: First, because AIMS testing was not carried out in 2000, we do not know whether the performance of ELL students has improved relative to that time. Second, Arizona has changed the AIMS test itself, including altering the passing score, and has twice changed the system it uses for reclassifying ELL students - once at the beginning of the 2004-05 school year, and again at the start of the 2006-07 school year. Results for those students classified as ELL across those years are therefore not clearly comparable.

Due to these limitations, and to a general lack of longitudinal data on individual ELL students, we do not have data that conclusively demonstrates whether ELL programs ultimately succeed — that is, whether children pass through them rapidly and ultimately perform as well as non-ELL students. So, while the test results we next discuss are certainly troubling, it is important to understand the limits of their analytic reach. With these caveats, we turn to the data. While Arizona students generally exceeded NCLB-mandated passage rates in math and reading, passing the AIMS test at rates of between 60% and 70%, ELL students were far behind. For example, among third graders, who pass the exam at a higher rate than older ELL students, only 50% passed the math exam in 2005 and just under 40% passed the

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provide us with at least a rough sense of relative performance, and so are useful here.

reading exam in the same year.[22] The situation grows worse at higher grades—in 2005 only 33% of ELL tenth graders passed math and only 20% passed in 2006. In reading, only 30% passed in 2005 and that number fell to barely more than 10% in 2006. In neither year did ELL reading scores in any grade meet federal standards, and in 2006 ELL students' math test results for all grades also fell below the federal line at every grade level.

Nor do students necessarily leave ELL status rapidly. While all witnesses agreed that some students may swiftly become proficient in English, they also agreed that many will need ELL instruction for more than two years, and that some will still need help after three years of training.

In short, despite considerable efforts, and some improvements in outcomes, Arizona, as a state, does not appear to have turned the corner on ELL education performance.

2. Conditions in Nogales

The statewide achievement gap between ELL and non-ELL students is also present in NUSD, although the district has made significant strides since 2000. The improvements it has made, however, appear to be due largely to successful management rather than to adequate state funding for ELL programs. The record indicates that with adequate

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[22] The passage rates for third graders in 2006 were even lower: 40% for math and 30% for reading.

incremental ELL funding, the improvements could have been greater and this gap could have been further narrowed.

a. Policy Changes and Test Results

Much of the improvement at NUSD stems from the successful management of Kelt Cooper, the district's Superintendent from 2000 to 2005. His successor, Dr. Guilermo Zamudio, has largely sustained Cooper's management policies. Despite the efforts of both superintendents, however, ELL students in Nogales continue to face serious challenges.

Cooper, who took the helm at about the time the Declaratory Judgment issued, adopted policies that ameliorated or eliminated many of the most glaring inadequacies discussed by the district court at that time. Cooper was able to reduce class sizes by enforcing restrictions on the district's open enrollment policy, significantly improving student/teacher ratios. In addition to lowering class sizes, Cooper improved teacher quality by changing the district's policies regarding the hiring of experienced teachers and by refusing to pay unqualified teachers who had been certified on an emergency basis as if they had the proper experience. He also fired many teachers' aides, many of whom were, he found, largely unqualified. Cooper also worked to institute district-wide student performance monitoring. Additionally, he pioneered a uniform system of textbook and curriculum planning, and he largely eliminated what had been a severe shortage of instructional materials by better

accounting for and preserving available materials and by acquiring new materials when needed.

Using careful financial management and applying for "all funds available," Cooper was able to achieve his reforms with limited resources. His budget did, however, rise between two and four percent annually, partly because the district twice passed an override, that is, a county-wide tax measure.

Nonetheless, Cooper's successor, Dr. Zamudio, indicates that there are still significant resource constraints. Despite Cooper's recruitment efforts, Nogales still must rely on some long-term substitutes, rather than upon permanent teachers. Other teachers have been "emergency-certified" and so have not been trained according to Arizona's standards. NUSD's starting base pay of $28,500 per year, which is below the statewide average, makes it difficult to recruit the fully qualified teachers that NUSD needs. The recruitment challenges mean that Dr. Zamudio has been unable to reduce student/teacher ratios further, to 15:1, which, both he and a defense expert testified, would significantly enhance English learning success. He would also like to be able to hire trained teacher's aides, who would be helpful in ELL programs, for the lower grades but has been unable to do so because of resource limitations.

The limits of NUSD's progress, even as it has improved its ELL programs, are apparent in the AIMS test results and reclassification test results introduced at the hearing, which show the same

problems that appear in the statewide data. The test results, we caution, have the same limitations that we have discussed at the state level, and cannot be read unequivocally to demonstrate that ELL programs are failing in NUSD because we lack longitudinal data on the performance of student cohorts who began as ELL students and who may or may not have been reclassified. It is fair to say, however, that the indications provided by the test data largely do not point in positive directions.

For instance, while it is clear that NUSD has reclassified many students, it is not clear how much of this success can be attributed to genuine academic progress and how much to changes in its classification methodology. During the 1999-2000 school year, there were 5,104 ELL students. The next year saw similar numbers, but between the 2001-02 and the 2003-04 school years, the number of such students hovered around 3800. Then, when Arizona implemented a new testing protocol (which was later concluded to be reclassifying too many students and replaced), the ELL population declined to about 3200 students in the 2004-05 school year and to 2474 the next year. In 2006-07 a new, reputedly more accurate and more difficult to pass test came into use, and Dr. Zamudio testified that he expects ELL student numbers to increase again.

Because of these shifts in reclassification methodology, the meaning of "ELL" changed over time. Comparison of AIMS test data for ELL students and non-ELL students over time are therefore not reliable. But, as some patterns persist,

we can point to several general trends based on AIMS test results for the 2003-04, 2004-05, and 2005-06 school years.[23]

First, within NUSD, ELL students in lower grades are doing substantially better than ELL students in higher grades. In 2005-06, for instance, while only 27% of ELL third graders failed[24] math, 76% of ELL tenth graders failed. ELL third graders failed reading 37% of the time; 78% of ELL tenth graders failed. And 35% of ELL third graders failed writing, while 76% of ELL tenth graders failed.

Second, ELL students in NUSD generally do worse than the state average score for all students (ELL and non-ELL). Only students in the lower grades sometimes reached or beat the average. Older students are falling far behind. For tenth graders in 2005-06, for instance, only 36% failed math statewide, but 76% of ELL tenth graders in NUSD did. For reading, the tenth grade state failure rate was 29%, while the tenth grade ELL failure rate in

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[23] Although the patterns we describe are consistent from year to year, passage rates varied somewhat from year to year. They rose from 2003-04 to 2004-05 but fell again in 2005-06. One of the defense witnesses suggested that the high 2004-05 passage rates could be related to problems with the reclassification system.

[24] AIMS is graded on a four-part scale. Students may "fall far below" the passing score, "approach" but not meet the standard, "meet" the standard, or "exceed" the standard. When we refer to the percentage of students "failing," we mean those who either "fell far below" or only "approached" the state passing score.

NUSD was 78%. And for writing, the state tenth grade failure rate was 36% and the NUSD tenth grade ELL failure rate was 76%.

Third, within NUSD, ELL students are still falling behind the district average for all students. Again, the gap grows more pronounced in higher grades. In 2005-06 in third grade, ELL students failed math at a 27% rate, reading at a 37% rate, and writing at a 35% rate, rates that were not too much worse than the district averages of 22%, 29%, and 30%, respectively. By tenth grade, however, ELL students failed math at a 76% rate, reading at a 78% rate, and writing at a 76% rate, far worse than the district averages of 50%, 42%, and 39%, respectively.

The picture, then, is of relative success at lower grades (although not equal to that of English speaking students *within* NUSD), and increasing failures for older students, a significant majority of whom are failing the state's basic achievement tests.

Federal performance classifications under NCLB generally correspond with this portrait: In 2004-05, one of Nogales' two middle schools failed to meet its adequate yearly progress goals under NCLB, as did the alternative high school. In 2005-06, the same middle school was under a restructuring plan, and corrective action was being taken in the alternative high school. The main high school had been given a warning, as had a lower-performing elementary school.

In a survey of the test results of ELL students statewide, NUSD students' performance was also

consistent with this general snapshot. This survey, commissioned by Arizona's Department of Education, reported the 2005 test results of students who were classified as ELL in 2003 and ranked schools by the average AIMS scores of these students.[25] Some, but not all, of NUSD's younger ELL students did very well. Four NUSD elementary schools ranked in the top ten schools in the state by this measure, with passage rates of over 70%. Two other elementary schools fared more poorly, ranking 41st and 152nd, with passage rates of about 60% and about 50%, respectively. Middle school performance was lower—one tied for 165th place, also with about a 50% passage rate, and the other ranked 409th, with only about 40% of its ELL students passing the test. The high schools are at the bottom of the heap. The main high school ranks 575th, with a 28.37% overall passage rate and Santa Cruz Alternative High School is four from the bottom at 625th place and a 8.62% passage rate.

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[25] No effort was made to verify that a given student was still ELL or that he or she had remained in ELL programming for the two intervening years. Nor are test scores available for these students in 2003. The result is that the survey data does not present a longitudinal survey of the progress of students who remained in ELL programs for that period. Nor is the data of value in demonstrating that NUSD's ELL students are doing better relative to non-ELL students, as non-ELL students' performance was not measured or ranked. More importantly, if, as Flores alleges, Arizona systematically underfunds ELL programs statewide, comparing one allegedly underfunded district with another does not show that funding in any given district is adequate.

Finally, there is at least one clear bright spot: For all grades in 2005-06, *reclassified* ELL students were doing about as well as native English speakers, which is a notable accomplishment, and which suggests that the ELL programs may well benefit those who successfully transition out of them. But, as the data on such scores does not track individual students, showing when they passed through ELL programs and how long it took them to do so, and because the reclassification methodology continues to shift, this bright spot does not offset the otherwise troubling ELL test data. On the data available, it is possible that some high achievers may rapidly be leaving ELL programs while other students continue to struggle, never achieving at the same levels as non-ELL students. Indeed, Dr. Zamudio testified that reclassification in NUSD takes, *on average*, four to five years and the district court so found. The encouraging success of reclassified students is therefore of limited significance with regard to the overall impact of NUSD's ELL program.

b. Funding

NUSD estimates its per pupil incremental costs for ELL programming for the 2005-06 school year at $1570.42, over three times the Group B level weight funding Arizona provides for ELL programs under either HB 2010 or HB 2064. NUSD has been able to finance the improvements it has made by seeking grants, diverting state base level funding away from other purposes, and passing county-level budget overrides.

Of the $1570.42 per pupil that NUSD indicates it spends on ELL programming, over half this amount, $824.25, is drawn from the district's maintenance and operations account (which includes both the ELL Group B funds and base level support funding). As this amount is well above the Group B weights, it indicates that NUSD is dipping into funds that would otherwise be used to fund basic educational purposes. Federal funds add about $484.05 per student, but most of these funds are earmarked for at-risk, low-income students, rather than ELL students (although the two groups overlap). Another $43.43 per student comes from county override funds. The remaining $218.69 per student comes from a variety of state, federal, and local funding sources and grants.

NUSD's budget has increased over the years, but ELL-specific funds have been a relatively small part of that increase. A schematic break-down of the budget over the relevant period, which does not appear to include the relatively small amount of funding from the county, was entered into evidence before the district court. We reproduce a somewhat modified version of that table here. The break-down shows *all* funds available to ELL students, including funds that are not ELL-specific. ELL-specific funding sources are labeled as such, and the total amount of ELL-specific funding is separately recorded:

Appendix A

	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Base level state funds	$2,592	$2,618	$2,721	$2,788	$2,858	$2,929	$3,039	$3,173
Group B ELL funds	$156	$157	$163	$321	$329	$337	$349	$444[26]
Other state ELL funds	$0	$0	$0	$126	$83	$64	$0	$74
Federal Title I funds	$439	$448	$467	$449	$487	$638	$603	$597
Federal Title II funds	$88	$63	$74	$101	$109	$91	$92	$87
Federal Title III (ELL) funds	$0	$0	$0	$67	$89	$114	$118	$121
Other state and federal grants	$58	$56	$59	$47	$207	$214	$205	$109
Total of all funds	$3,302	$3,342	$3,484	$3,899	$4,162	$4,387	$4,406	$4,605
Total ELL funds	$156	$157	$163	$514	$501	$515	$467	$639

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[26] This amount is based on HB 2064's Group B weight increase. If that portion of HB 2064 does not go into effect, the figure will be $364.86

In sum, as this table suggests, ELL-specific funds have never covered all ELL programming costs. NUSD can pay the incremental cost of its ELL programs only by diverting non-ELL-specific funds for that purpose, and the district was able to do that at the time of the Declaratory Judgment, as now. These ELL-specific funds, however, have increased, due largely to the rise in Group B weights occasioned by HB 2010 in 2002-03 and will increase again due to HB 2064 if the new Group B weight goes into effect. There remains, however, a fundamental mismatch between the ELL costs NUSD requires and the funds provided for that specific purpose.[27]

c. Conditions in Other Districts

District officials testifying at the hearing reported incremental costs ranging from $1,077 per student to $4,072 per student. All of these districts are funding their programs by diverting funds from other sources, often by using additional taxes that they are allowed to levy for use in desegregation programs.[28] Group B weights, alone, are not

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[27] We note that, for a variety of contractual and statutory reasons, and to ensure a fiscal cushion, NUSD carries over some portion of its budget every year, including some funds that it might otherwise spend on ELL programming or other needs. That practice, rooted in careful fiscal planning, does not indicate a surplus of funds for educational needs.

[28] A broader survey of school district officials conducted for Flores by Dr. Chuck Essigs of the Arizona Association of School Business Officials yielded similar results. Dr. Essigs did not independently verify his survey results or ensure that

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generally sufficient to fund ELL programs.

Testimony from officials in other districts confirms that reclassification regularly takes longer than two years for many students. The average reclassification time in the Tucson Unified School District, for instance, is 4.6 years. In the Murphy Elementary School District, nearly two-thirds of ELL students took more than four years to be reclassified. Similarly, in the Scottsdale Unified School District, the majority of ELL students take more than two years to be reclassified, and in the Glendale Union High School District, 46% of ELL students at one school and 15% of ELL students at another had been in ELL programs for more than two years. No district submitted evidence showing that all of its ELL students had been reclassified within two years.

G. The Ruling on Remand

After the evidentiary hearing at which the facts concerning the current status of ELL students and ELL funding were presented, the district court again denied relief from judgment. *Flores v. Arizona*, 480 F. Supp. 2d 1157, 1167 ("*Flores XI*") (D. Ariz. 2007).

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responding districts used a common cost reporting system. As these results vary widely (from $351 to $3,874), neither we nor the district court rely much upon them. It is worth noting, nonetheless, that, for the fourteen surveyed districts with over 1,000 ELL students, incremental costs in 2006-07 in all but one were above $1,000, with most of the districts' incremental costs in the range between $1,000 and $2,000.

The court held that the improvements at NUSD do not establish that Arizona is fulfilling its duty to fund ELL programming rationally. *Id.* at 1160, 1166. Most of these improvements, the court found, are due to NUSD's own management improvements, not to reliable or sufficient funding. *Id.* at 1160. And the improvements are limited: NUSD's ELL high school students, in particular, are still falling well behind its non-ELL students, and even the successes will be "fleeting at best" unless Arizona meets its funding obligations. *Id.* Thus, although NUSD is "doing substantially better," *id.*, and the state has developed a significantly improved infrastructure for ELL programming, "mere amelioration of those specific conditions" cited as examples of the funding shortage in the Declaratory Judgment, is "inadequate" to justify relief: "Rather, compliance would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction." *Id.* at 1165.

The district court went on to determine that the Superintendent and the Legislative Intervenors had not demonstrated that such a system was in place. The court decided that HB 2064 does not sufficiently address the inadequacies of Arizona's ELL funding system and, in fact, introduces new problems. In so holding, the district court reasoned as follows: HB 2064's increase in Group B weights is inadequate, as "the per-student incremental cost of providing ELL instruction is greater than either the current Group B weight of $365 [set by HB 2010] or the increased weight of $444 that would be provided if [the c]ourt approved HB 2064, both in NUSD and in other

districts." *Id.* at 1162. HB 2064's two-year cut-off of that funding would suddenly, and irrationally, further underfund school districts. *Id.* at 1166. The HB 2064 grant programs, which might have linked funding rationally to costs, are no better. The Arizona structured English immersion fund suffers from the same irrational two-year cut-off, *id.* at 1163, and both it and the compensatory instruction fund violate provisions of federal law that bar taking federal funds into account in making state funding decisions and bar supplanting existing state funding with federal monies. *Id.* at 1166.

The district court concluded that, without a rational funding system for ELL incremental costs, Arizona remains out of compliance with the EEOA, despite some successes in NUSD:

> On January 24, 2000, this Court held that the State's minimum funding level for ELL programs was arbitrary and capricious and bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic standards. . . . More than 7 years later, circumstances in this regard remain the same. The Moving Parties have not shown compliance with this Court's decree, much less changed circumstances that would warrant modification or dissolution of this Court's order.

Id. at 1167. The district court gave Arizona until the end of the then-current legislative session to comply. *Id.* The Legislative Intervenors and the Superintendent timely appealed.[29]

II. ANALYSIS

A. Standard of Review and Jurisdiction

Rule 60(b)(5) provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . . [when] the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.[30]

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[29] After Arizona failed to comply with the district court's order in *Flores XI*, the court again found the state to be in contempt on October 10, 2007. *See Flores v. Arizona*, No. CV-92-596 ("*Flores XII*")(D. Ariz. 2007). The present compliance deadline is March 4, 2008. *Id.* at 4. The contempt order has been separately appealed and is not before us. We do, however, discuss it below in Part II(C)(2) for the light it sheds on the adequacy of HB 2064.

[30] Amendments to the Federal Rules of Civil Procedure designed to clarify but not to make any substantive changes became effective on December 1, 2007. *See* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part I)*, 84 MICH. BAR J 56 (Sept. 2005). We quote the current version of the rule, although the district court ruled based on the prior version. The prior version provided that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [if] . . . (5) the judgment has been satisfied, released, or discharged, or a prior

(Continued...)

The first two circumstances do not obtain here: Although the moving parties argue that Arizona has achieved the purposes of the judgment through actions other than those required by the Declaratory Judgment and the ensuing orders, Arizona has in fact not "satisfied" the prior judgment, as it has not complied with its terms. And there is no pertinent earlier judgment that has been reversed or vacated. Instead, the moving parties are, in practical terms, contending that it "is no longer equitable" to apply the judgment and the present injunction prospectively.

It is appropriate to grant a Rule 60(b)(5) motion for this reason when "the party seeking relief from an injunction or consent decree [meets its initial burden by showing] 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)); *see also Bellevue Manor Assoc. v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999) ("*Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5)."). Once that showing is made, modification may be warranted "when changed factual conditions make

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judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

We find no relevant distinction between the two formulations.

compliance with [a consent decree or an injunction] substantially more onerous," when a decree or injunction "proves to be unworkable because of unforeseen obstacles[,] or when enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384 (citations omitted); *see also SEC v. Coldicutt*, 258 F.3d 939, 941-42 (9th Cir. 2001) (using this standard). Finally, modification is necessary if a consent decree or injunction "become[s] impermissible under federal law." *Rufo*, 502 U.S. at 388; *see also Agostini*, 521 U.S. at 215 (same).

We review district courts' rulings on motions for relief from judgment under Rule 60(b) for abuse of discretion. *United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005). "We may not reverse a district court's exercise of its discretion unless we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *Coldicutt*, 258 F.3d at 941. In this context, "[a] district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Asarco*, 430 F.3d at 978.

We emphasize that our task in this context is a limited one: We do not sit to retry the case, nor to reexamine unappealed legal determinations, and do not have jurisdiction to do so. "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement," *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007), and "[b]ecause the time for appeal ha[s]

passed in this case, the interest in finality must be given great weight." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981). We have cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in timeliness and finality served by Rule 4(a). *See In re Stein*, 197 F.3d 421, 425-26 (9th Cir. 1999). Simply put, motions for relief from judgment may not be used to remedy a failure to contest in the first instance the legal rulings underlying the judgment itself.[31]

Our review is somewhat closer in the context of institutional injunctions against states "due to federalism concerns" implicated by such injunctions. *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997). In such contexts, "[w]e scrutinize the

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[31] The Legislative Intervenors cite to a pre-*Agostini* Sixth Circuit case, *In re Detroit Auto Dealers Ass'n, Inc.*, 84 F.3d 787, 790 (6th Cir. 1996) for the proposition that a "party should be entitled to modification whenever the original decree could not properly have been issued on the state of facts that now exists." This sentence, in turn, is drawn from a decades-old student note, *Developments in the Law - Injunctions*, 78 HARV. L. REV. 994, 1082 (1965), which was prescribing changes in the then-current law, not describing the state of the law.

To comport with modern law, and particularly with the final nature of unappealed judgments, the language must be read to mean that relief is appropriate when the "original decree could not properly have been issued on the state of facts that now exists *applying the legal framework used by the original unappealed judgment*." Otherwise, such a rule would invite relitigation of settled judgments using Rule 60(b) as a vehicle, a use which, as noted, is improper.

injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995); *see also Hook*, 107 F.3d at 1402. Nonetheless, "we will defer to the district court so long as any injunctive relief it provides remains within these parameters," *Clark*, 60 F.3d at 604, and the burden of proof remains on the moving party. *Hook*, 107 F.3d at 1402; *Rufo*, 502 U.S. at 383-84. Additionally, federalism concerns are substantially lessened here, as the state of Arizona and the state Board of Education wish the injunction to remain in place.

The Superintendent and Legislative Intervenors also question the district court's compliance with our mandate on remand and the propriety of several evidentiary rulings. "This court reviews de novo a district court's compliance with the mandate of an appellate court." *United States v. Perez*, 475 F.3d 1110, 1112 (9th Cir. 2007) (citations and alterations omitted). With exceptions not pertinent here, "we generally review the district court's ruling on a motion *in limine* only for an abuse of discretion." *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000).

Finally, the parties dispute each others' standing. The Legislative Intervenors, first, contend that Flores lacks standing to argue that HB 2064 does not represent a change in circumstances sufficient to warrant relief. The Legislative

Intervenors are wrong: HB 2064 holds itself out as a remedy for Flores and was presented to the court by Arizona and by the Superintendent and Legislative Intervenors as such. Whether or not Flores would have had standing to challenge HB 2064 in the first instance, she certainly has standing to argue that a purported remedy will not satisfy a judgment in her favor.

Second, Flores challenges the standing of the Superintendent because he does not make the funding decisions at the core of this case. As to that basis for disputing the Superintendent's standing, Flores is wrong. The Superintendent does not, it is true, write school funding laws, but he does administer the state's education system, including the HB 2064 grant system, *see* ARIZ. REV. STAT. § 15-251, and obviously has a vital interest in whether or not funding for the programs he oversees is EEOA compliant. He is a named defendant in the case; the Declaratory Judgment held him to be in violation of the EEOA, *Flores II*, 172 F. Supp. 2d at 1239-40, and the current injunction runs against him.[32] That judgment against him may not be essential to relief does not mean that he lacks standing to contest an order running against him.

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[32] That the injunction may be enforced against the Superintendent is indicated by the current civil contempt order which orders him to "use [his] best efforts within the power granted to [him] . . . to ensure compliance with the March 22, 2007 Order [*Flores XI*] by March 4, 2008." *Flores XII*, No. CV-92-596 (D. Ariz. October 10, 2007).

The Superintendent's standing is, however, for a different reason, fairly tenuous. He is "[s]ubject to supervision by the state board of education" with regard to distributing monies to local schools, and must "[e]xecute, under the direction of the state board of education, the policies which have been decided upon by the state [B]oard." ARIZ. REV. STAT. § 15-251(3), (5). It appears that the Superintendent, by filing the motion to vacate the judgment, by pursuing this appeal, by maintaining that ELL-specific funding does not matter to the success of ELL education in Arizona, and by seeking to derail any additional ELL-specific funding in Arizona, is not carrying out "the policies which have been decided upon by the state board," which this litigation suggests are directly to the contrary in all regards. Moreover, the Superintendent's standing is limited to defending against the judgment and injunction as they run against him. The other defendants are not seeking relief from the judgment and orders, and the judgment and orders against the remaining defendants can be given full effect without running against the Superintendent, as the state Board of Education can order him to comply.

The state Board of Education, however, is obviously fully aware of the actions the Superintendent has taken in this litigation. There has been no suggestion that it has ordered him to drop his motion or this appeal, or to conform his position to that of the board, although it may well be that it could do so. Given that vacuum, we have no basis for determining on the present record that the Superintendent is acting outside his authority in

bringing his motion and pursuing this appeal. We will not substitute our judgment for that of the state Board, which better knows its own policy determinations and can choose when to exercise its supervisory authority. We do observe, however, that the current structure of this litigation is placing the federal judiciary in the uncomfortable position of mediating between state officials with regard to the execution of an obligation of the state as a whole. It would be vastly preferable for the state to work out through its own political structure a consistent position and approach.

Despite these concerns and although the issue is exceedingly close, we conclude that the Superintendent does have standing to maintain his Rule 60(b)(5) motion and this appeal, but note that the result had he succeeded would have been to vacate the judgment and injunction only as they run against him.

Third, Flores challenges the standing of the two Legislative Intervenors, as they speak only for themselves and do not represent the legislature as a whole, have no judgment against them, and no apparent direct interest in the judgment outside of an abstract policy interest. We need not decide this question, although the extent and degree of the standing of individual legislators under these circumstances is in very serious question. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997). Parties need not have standing to intervene in our circuit, *see State of California Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 846 n.9 (9th Cir. 2003), although they must

have standing to appeal, *see Diamond v. Charles*, 476 U.S. 59, 68 (1986). Because the Superintendent does have standing and also appealed, we would not lose jurisdiction over this appeal even if the Legislative Intervenors did not have standing.

B. Evidentiary Issues

Preliminarily, we briefly address evidentiary issues arising from the hearing. The Legislative Intervenors contend that the district court erred by admitting (1) evidence of ELL costs outside NUSD; (2) evidence of non-incremental costs; (3) the testimony of Flores' expert on federal education funding law; and (4) the NCSL study, the Staffers' study, and Dr. Essigs' study. We find no abuses of discretion.

First, because Arizona never complied with the district court's earlier orders to prepare and adopt a cost study, the district court was right to look to whatever reliable evidence of ELL programming costs was available so as to better understand and assess the costs in NUSD. The experiences of other districts help to establish what incremental costs for ELL programs are likely to be, the variability in those costs, and various ways of delivering the programs. Admitting such evidence was not an abuse of discretion.

Likewise, we find no abuse of discretion with regard to admitting evidence of "non-incremental" costs. The Legislative Intervenors contend that some of the costs identified by NUSD and other districts do not fit within HB 2064's definition of "incremental

costs." It is not at all clear why that particular definition should control at the hearing, as HB 2064's adequacy as a whole was and is in question. In any event, although the Legislative Intervenors may disagree about how costs were measured, they had ample opportunity to challenge cost figures at the hearing, and took that opportunity.

Third, we find no abuse of discretion with regard to the expert testimony on federal educational funding law. It is true that "matters of law" are generally inappropriate subjects for expert testimony, *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992), but there may be "instances in rare, highly complex and technical matters where a trial judge, utilizing limited and controlled mechanisms, and as a matter of trial management, permits some testimony seemingly at variance with the general rule." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997). In this hearing, which was, in large part, an inquiry into education law and policy, the expert testimony may well have been helpful. It was, in any event, not prejudicial in this bench trial, where there was no danger that a jury might give too much credence to a legal expert. *See id.* at 99.

Finally, we find no abuse of discretion with regard to the admission of the three cost studies.[33]

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[33] Flores argues that two of the studies are admissible under the public records exception to the hearsay rule, Fed. R. Evid. 803(8). That point is not clear, but we do not decide the

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The NCSL study, conducted by an expert research agency and based on expert opinion is certainly not unreliable under the standards set by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and extended by *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). To the extent that one portion of the study — its survey of Arizona schools — had a low response rate, the study notes the deficiency and cautions against giving that portion too much weight. There was no error in admitting it.

The Staffers' study, which was prepared as a partisan advocacy document by non-experts, and Dr. Essigs' survey, which did not use any form of verification and appears to have been an entirely informal email survey, are more questionable. But even if there was error here, the Legislative Intervenors were not prejudiced. As a general matter, "in a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial." *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994). So, too, for potentially unreliable evidence. Given that the two studies are largely duplicative of other properly admitted evidence, and given the facial deficiencies of HB 2064, we cannot say that the outcome of the hearing would have been any different had the two studies not been admitted.

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question, as there was no prejudice resulting from their admission.

There is no reversible error here, so we turn to the merits.

C. Is Relief from Judgment Warranted?

This case is unusual in that the Superintendent and Legislative Intervenors (1) did not appeal from the original judgment holding that Arizona's funding system for ELL programs was in violation of the EEOA; (2) did not appeal from the injunctions issued to remedy that violation; and (3) argue only in the alternative that HB 2064, which defies Arizona's ELL funding system, demonstrates actual compliance with the Declaratory Judgment and so warrants relief. The Legislative Intervenors maintain that Arizona is in compliance "with or without" HB 2064, and the Superintendent similarly maintains that the statute is "irrelevant."

As to the third point, both the Superintendent and the Legislative Intervenors argue that the district court should not have considered HB 2064's legality on remand.[34] They instead primarily argue that neither we, nor the district court, need look to HB 2064 at all. In their view, conditions have so changed as to make the Declaratory Judgment's emphasis on developing a cost-linked ELL funding structure irrelevant and so render it inequitable to require the state to do so.

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[34] In contrast, their original motion for relief from judgment relied heavily upon HB 2064 as grounds for relief.

Appendix A

Our previous Rule 60(b) cases generally deal with requests for modification due to changed circumstances that rendered compliance more onerous, *see Asarco*, 430 F.3d at 975-76; *Bellevue Manor Assoc.*, 165 F.3d at 1250-52, or due to actual compliance, *see Coldicutt*, 258 F.3d at 941-43. The moving parties here, instead, urge us to look away from Arizona's attempt to comply—HB 2064—and turn instead to other factors—a generalized increase in state funding, changes in the management of NUSD, and passage of the No Child Left Behind Act of 2001. These changes, they urge, sweep away the foundations of the prior rulings and so justify relief from them.

As a general matter, there are some instances, likely rare, in which a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable even though neither appealed nor complied with. *See, e.g., Rufo*, 502 U.S. at 383-85. Such circumstances are not present here, however, nor do we think it proper to reward Arizona's foot-dragging by granting relief from judgment on grounds that could have been raised on appeal from the Declaratory Judgment and from earlier injunctive orders but were not. Further, HB 2064 is among the most significant changes in ELL education and finance in the state since the Declaratory Judgment issued and so must be examined to determine whether it constitutes compliance with the district court's orders.

We now discuss the arguments for relief in turn, beginning with the novel proposition that the

judgment need no longer be complied with and then turning to whether Arizona *has* complied.

1. Whether Compliance is Still Equitable

The core premise of the Declaratory Judgment is that Arizona is "violating the EEOA because [its] arbitrary and capricious *Lau* appropriation is not reasonably calculated to effectively implement the *Lau* educational theory which it approved, and NUSD adopted." *Flores II*, 172 F. Supp. 2d at 1239. The central idea, then, is that ELL programs impose costs additional to those generated by ordinary school activities, *id.* ("The State's minimum base level for funding *Lau* programs . . . . bears no relation to the actual funding needed. . . ."), and that, in the absence of such state support, ELL programs would necessarily be inadequate.[35] The district court listed six deficiencies generated by inadequate resources in 2000. Because many of these specific problems have been solved by better management in NUSD, and because school funding has generally increased, the Superintendent and Legislative Intervenors argue that the judgment has effectively been satisfied.[36] We review these arguments; it is

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[35] That premise has been repeated and amplified in a host of similarly unappealed post-judgment relief orders. *See, e.g.*, *Flores VII*, No. CV-92-596 at 5 (D.Ariz. January 28, 2005); *Flores VI*, No. CV-92-596 at 2 (D. Ariz. June 12, 2002); *Flores III*, 160 F.Supp. 2d at 1044.

[36] The Superintendent and Legislative Intervenors also argue that NUSD must have solved its problems because district officials signed a federal grant application that contains a

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not, however, our task to retry the case. The district court should be affirmed unless it has clearly erred on the record before it in its factual findings or otherwise has abused its discretion.

NUSD should not be penalized for doing its best to make do, despite Arizona's failure to comply with the terms of the judgment. Granting relief would absolve the state from providing adequate ELL incremental funding as required by the judgment. The judgment determined that the state has not provided adequate resources to support NUSD's ELL programming, as required by the EEOA. We cannot now decide anew the unappealed Declaratory Judgment, nor the many post-judgment orders so holding. As we have explained, the provisions of Rule 60(b) may not be applied to "derogate from the purpose and effect of Rule 4(a)." *In re Stein*, 197 F.3d at 425. The legal determinations made in the Declaratory Judgment were unappealed and are now final.

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boilerplate assurance that it is in compliance with all state and federal laws and regulations. First, whether NUSD is in compliance is not the issue; NUSD is not a defendant. Arizona is, so the question is whether *Arizona* is in compliance. It is true that the state also submitted a rote assurance of compliance with federal law (although no party relies upon it), but we cannot say that the district court was obliged to accept such boilerplate, generalized statements as true, or that the unsubstantiated statements make the district court's considered determination that NUSD still has problems, based on district-specific data, clear error.

Appendix A

Underlying the Declaratory Judgment and post-judgment orders is the basic determination under the EEOA that, given Arizona's educational funding structure, ELL programs require substantial state funding in addition to that spent on basic educational programming. That conclusion rests, in turn, on the recognition that ELL students require additional attention to bring their language skills to the point where they can fully benefit from instruction in English.

To prevail on their argument, then, the Superintendent and Legislative Intervenors needed to show either that the basic factual premises of the district court's central incremental funding determination had been swept away, or that there has been some *change* in the legal landscape that makes the original ruling now improper. It will not suffice to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings.

a. Changes in Fact

We begin with the moving parties' attempt to make the first, fact-based showing—that the factual circumstances have so shifted as to sweep away the unappealed incremental funding determination. To succeed on this ground, given the original ruling, they were required to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona or that Arizona's "base plus incremental costs" educational funding model was so altered that focusing on ELL-specific incremental costs funding has become irrelevant and inequitable.

Turning, then, to the first possibility, we cannot find that the district court clearly erred when it found, consistent with the basic premises of this litigation, that in 2007, as in 2000, "ELL students need extra help and that costs extra money." *Flores XI*, 480 F. Supp. 2d at 1161. At the evidentiary hearing, all witnesses agreed that ELL students face unique challenges which require school districts to invest substantially in teacher training, materials, monitoring, and assessment efforts. If anything, after 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance. The recent statewide program to improve ELL testing, monitoring, and support programs also imposes incremental costs on school districts.

Nor did the district court err when it determined that "the per-student incremental cost of providing ELL instruction is greater than either the current Group B weight" of about $340 per student or the roughly $450 per student that would be provided were HB 2064's provision on Group B weights to be approved. *Id.* at 1162. As the Superintendent and Legislative Intervenors observe, Superintendent Cooper's management changes did ameliorate many of the specific examples of resource shortages that the district court identified in 2000. They did not, however, result in such success as to call into serious question NUSD's need for increased

incremental funds. NUSD's own cost study, along with evidence from other districts throughout Arizona, placed estimated incremental costs at well over $1000 per student. The expert panels consulted in the NCSL study similarly recommended spending over $1000 per student, and, in some cases, recommended spending over $2000 per student. The NCSL's school district survey reported *actual* per student spending as in the $600 range but cautioned that that figure might be an underestimate. The SjobergEvashnek study reported that actual expenditures in NUSD shortly after the Declaratory Judgment were in the $300 per student range but also noted that its estimate was likely low. Taken together, these studies provide very strong support for the proposition that the incremental costs of a compliant program not only exceed the Group B weights, either as presently set or as provided by HB 2064, as the district court concluded, but in fact likely exceed $1,000 per student, both in Nogales and statewide.[37]

The Superintendent and Legislative Intervenors nonetheless maintain that the improvements in ELL

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[37] Arizona's ineffectiveness in ascertaining costs has made the question of costs more difficult to answer than it might have been. Because the state's efforts to gather cost study data were incomplete—the SjobergEvashnek study was inconclusive and the NCSL study was repudiated by the legislature, *see* HB 2064 § 13(C)—the precise incremental costs of ELL programming are not known and we and the district court must rely on what evidence is in the record from the various cost studies and from NUSD and other districts.

achievement in NUSD demonstrate that additional incremental funding is no longer required. To the contrary, the data from NUSD supports our conclusion that the district court did not abuse its discretion in holding otherwise.

As Dr. Zamudio testified, resource constraints remain: NUSD still cannot afford to pay market rate salaries to attract the teachers it needs to reduce class sizes to levels more conducive to ELL education, nor can it hire qualified teacher's aides for the lower grades. That these constraints matter is apparent from the persistent achievement gaps documented in NUSD's AIMS test data. As we discussed at length above, ELL students in NUSD continue to fall behind their native-English-speaking counterparts, both statewide and within the district. These gaps grow in the higher grades, as the district court found, and are disturbingly large. Although, as we have noted, the data is limited, the burden here is on the moving parties to prove the factual changes on which they premise their motion to vacate the judgment. *See Asarco*, 430 F.3d at 979. We cannot say that the district court clearly erred when it found this burden was not met. A district in which the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding

ELL programs and so warrants relief from judgment.[38]

The Superintendent and Legislative Intervenors respond, essentially, that even if ELL programming costs do exceed ELL-specific funding, there is ample state funding to cover them. They argue, in other words, that focusing solely on ELL-specific funding, and on the Group B weights in particular, is no longer appropriate given general increases in education funding since 2000.[39] Such a focus, they contend, mistakes "the details, even the minutiae, of the intermediate methodologies the court has devised" to reach compliance for compliance itself.

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[38] That *reclassified* students in the 2005-06 school year do about as well as native English speakers, however, is encouraging, and may suggest some degree of success, as does the increase in reclassification rates in NUSD. But because the reclassification standard has repeatedly changed and because the record indicates that reclassification takes many years, the record does not demonstrate that NUSD is succeeding in rapidly and permanently reclassifying ELL students, nor on the time it takes to reclassify students. On the current record, we certainly cannot say that the encouraging data on the scores of reclassified students and on reclassification rates is sufficient to have rendered the district court's findings clearly erroneous.

[39] They also point to the increased institutional support, such as new training and monitoring programs, now provided by the state. That support is of limited relevance, as the need to establish monitoring and training programs was set out in the *Flores* consent decree. That Arizona may have satisfied the decree, which dealt with issues not included in the Declaratory Judgment, does not mean that the Judgment has also been satisfied.

Glover v. Johnson, 138 F.3d 229, 233 (6th Cir. 1998).[40] With this argument, the Superintendent and Legislative Intervenors seek to reopen matters made final when the Declaratory Judgment was not appealed. The EEOA provides that states must not "deny equal educational opportunity . . . by . . . the failure by an educational agency to take *appropriate* action to overcome language barriers that impede equal participation." 20 U.S.C. § 1703(f) (emphasis added). Diverting base level funds—thereby hurting all students in an attempt to equalize opportunities for ELL students—is not an "appropriate" step. The district court recognized as much by holding that Arizona had not taken "appropriate" action to comply with the EEOA at *Castaneda* step two by failing to "set a minimum base funding level per [ELL] student" that was rationally related to costs, regardless of the base level funding provided for all students. *Flores II*, 172 F. Supp. 2d at 1239.

For eight years, Arizona has attempted to remedy *that* deficiency in ELL-specific funding, and

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[40] In *Glover*, a district court overseeing an original judgment ordering parity in the treatment of prisoners regardless of gender was holding the defendants to finely-tuned compliance plans that specified, with great detail, conditions in the prisons. *Id.* at 233-36. The Sixth Circuit vacated a round of contempt sanctions arising from violations of these plans, emphasizing that the goals of the underlying judgment were simply to fix the underlying gender discrimination and end judicial involvement and warning against "judicial micromanagement." *Id.* at 241, 245. As we develop, *infra*, such micromanagement is not at issue here.

for eight years the parties have litigated based upon that premise. Unlike in *Glover*, which repudiated the district court's excessive concern with specific compliance steps rather than with the core of its judgment, looking to the adequacy of ELL-specific funding does not miss the forest for the trees. It cuts to the heart of this case, which has been about such funding since 2000, when the parties dealt with the other issues in a consent decree. If the Superintendent and Legislative Intervenors believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they should have appealed the Declaratory Judgment. They may not now up-end its basic legal conclusions.

Nor have the fundamentals of the Arizona school funding system changed in any way that undermines the district court's original conclusion that incremental ELL funding is what matters for EEOA purposes. Accepting the Superintendent and Legislative Intervenors' argument would be to hold that the funding restrictions and categories used by Arizona are meaningless. As we have explained, Arizona allocates ELL funding *on top* of base level support. HB 2010 and HB 2064 have followed this approach. This statutory scheme is still premised on the idea that ELL programming imposes costs *additional* to those covered by ordinary base level funding. Base level funds are still provided in block grants, as in 2000, and the grants are, as they were in 2000, unrestricted. And base level funding, although apparently not itself based on a clear cost accounting of educational needs, *see Roosevelt I*, 877

P.2d at 810, must still support most non-ELL educational costs. It is the base level funds that, if NUSD had no ELL students, would be spent on math, reading, writing, and other basic subjects. That funds for *both* basic educational support and ELL costs have increased does not indicate that the fundamental pattern has changed. In 2000, as today, ELL incremental costs *could* be covered by diverting basic educational support, hampering the state's ability to provide a basic education to all Arizona students. So, by underfunding ELL programs and forcing NUSD to dip into those base level funds, Arizona still forces it to choose between base level needs and ELL programs — which the district court refused to view as an answer to ELL funding in 2000, when the option was as available as it is now. That binding legal determination is not now subject to reconsideration.[41]

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[41] Federal funds have also been taken out of the compliance calculus by the Declaratory Judgment. The district court understood EEOA compliance to be a state obligation and so ruled when, despite noting the presence of federal grants (which it doubted would be renewed), it held Arizona to be out of compliance with the EEOA for providing inadequate *state* funding and required *Arizona* to fund its ELL programs adequately. *Flores II*, 172 F. Supp. 2d at 1236, 1239. That unappealed determination still stands. Although federal funds have since increased, we do not find that this increased funding availability undermines the district court's basic legal determination that the EEOA obligation rests in the first instance with Arizona. Indeed, as we discuss below, federal education funding law is generally designed to layer federal

(Continued...)

Nor do circumstances in NUSD demonstrate that anything has happened to undermine the district court's conclusion in the original Declaratory Judgment that adequate levels of ELL-specific funding were critical to EEOA compliance. Ninety percent or more of NUSD students are either still in or have been in ELL programs. It is the *same* students who will suffer as the district shifts funding away from core educational needs to support ELL programs. When NUSD must choose to fund, say, required structured English immersion endorsements for its staff, rather than expanding its high school math or art offerings, all students will suffer, including ELL students, now as in 2000.

In short, the solution posited by the Superintendent and Legislative Intervenors — which the amici school districts and school boards in this case call a "Hobson's choice" — was rejected by the district court as a matter of law in the Declaratory Judgment when it based its holding on ELL-specific funding in general and the Group B weights in particular. Nothing significant has changed to undermine that ruling. Instead, the Superintendent and Legislative Intervenors are simply placing their suggested solution — spending less on basic education so as to have sufficient funds for ELL purposes — on the table after it was necessarily

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funds on top of state education funding and to ensure that state funds are allocated without regard to federal funds.

rejected in the unappealed judgment, which requires ELL-specific funding. That they may not do.

There was no clear error in the district court's factual findings and no abuse of discretion in its legal conclusion that the landscape was not so radically changed as to justify relief from judgment without compliance.

b. Changes in Law

The Superintendent and Legislative Intervenors also offer a legal change argument as to why the premises of the Declaratory Judgment have been so undermined as to justify relief from judgment despite noncompliance. They maintain that the passage of NCLB — and, in particular its Title III, which focuses on ELL students — has in some fashion altered their obligations by making the *Castaneda v. Pickard* framework "obsolete," urging two points: First, that state compliance with NCLB benchmarks should be enough to satisfy the EEOA, and hence the judgment and, second, that NCLB obviates any need to do a state-wide cost study of ELL program incremental costs.

We are unpersuaded by the first, more important point. The Superintendent and Legislative Intervenors fail to appreciate the distinct purposes of the EEOA and NCLB: The first is an equality-based civil rights statute, while the second is a program for

overall, gradual school improvement. Compliance with the latter may well not satisfy the former.[42]

Title III of NCLB sets out to "help ensure that children who are limited English proficient . . . attain English proficiency . . . and meet the same challenging State academic content and student achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1). To aid in this goal, it provides grants to states with federal government-approved plans to benefit ELL students. *See* 20 U.S.C. §§ 6821-26. To retain grant eligibility, grantees must meet "annual measurable achievement objectives . . . includ[ing] . . . making adequate yearly progress for limited English proficient children." *See* 20 U.S.C. § 6842.

These objectives include "at a minimum, annual increases in the number or percentage of children making progress in learning English," "at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year," and "making adequate yearly progress" in such children's academic achievement. 20 U.S.C. § 6842(a)(3)(A).

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[42] We also note that NCLB became law on January 8, 2002, *see* 115 Stat. 1425, prior to the district court's compliance rulings on HB 2010, prior to the parties' previous appearance before this court in 2006, and more than five years prior to this appeal. It is now more than a little late to argue that NCLB effectively repeals the EEOA, and so justifies relief from the district court's judgment and orders. Any such change occurred well before the most recent orders were entered.

Arizona defines these goals as "yearly growth in the fraction of students making progress towards English proficiency, those attaining English proficiency, and those students meeting/exceeding the AIMS objectives in order for Arizona to [meet the requirement that 100% of all students pass AIMS by] 2013-14." ARIZONA'S SCHOOL ACCOUNTABILITY SYSTEM TECHNICAL MANUAL: VOLUME III: TITLE III ACCOUNTABILITY at 5 (2005). Specifically, school districts are required to increase the fraction of students making progress toward English proficiency or being reclassified as English proficient by a specified percentage each year.[43] Additionally, increases in reading and math proficiency are prescribed.[44] *Id.* at 5-11. Importantly, this very gradual improvement plan does not set as an objective immediate equalization of educational opportunities for each such student.

NCLB, in other words, packages federal grants with discrete, incremental achievement standards as part of a general plan gradually to improve overall performance. It does not deal in the immediate, rights-based framework inherent in civil rights law, although it is intended to ameliorate over the longer haul the conditions that lead to civil rights

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[43] In academic year 2003-04, a 10% increase was required. This requirement increases by one percentage point each year until 2011.

[44] This increase must equal roughly 10% every three years until 2010, at which point it must increase 10% per annum until 2014.

violations. Perhaps recognizing as much, Title III of NCLB explicitly provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847.

The EEOA is just such a rights-enforcing law. It requires states "to ensure that needs of students with limited English language proficiency are addressed," *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981), by requiring them to remove barriers to equal participation in educational programs now rather than later, and it provides students with a right of action to enable them to enforce their rights, *see* 20 U.S.C. § 1706; *Los Angeles NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 950-51 (9th Cir. 1983). The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools. An individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes "adequate yearly progress" towards improving academic achievement overall, including for ELL students.

The position pressed by the Superintendent and the Legislative Intervenors — that state compliance with NCLB necessarily satisfies the EEOA[45] —

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[45] We note that even if the state as a whole complies with NCLB, that does not mean that the individual district is in compliance.

cannot be squared with this understanding of the two statutes. In their view, NCLB now defines "appropriate action" under the EEOA, such that NCLB compliance is dispositive of EEOA compliance, regardless of whether incremental ELL funding is currently adequate to provide equal educational access to ELL students. But such an interpretation would, first, produce strange results: If a state happened to meet adequate yearly progress under NCLB one year, no suits could proceed under the EEOA, even if fundamental linguistic inequalities persisted in some or all of its schools, even if ELL financial resources were entirely inadequate, and even if the particular students bringing suit had not received adequate ELL assistance nor made any progress towards English language proficiency. Any meaningful ability to use the right of action under the EEOA would thus wink in and out of existence based upon the year-to-year vagaries of overall school test scores. The EEOA does not tolerate such ephemeral compliance. *See Castaneda*, 648 F.2d at 1010 (holding that a state violates the EEOA if even an adequately-funded program "fails, after being employed for a period of time sufficient to give the plan a legitimate trial"). The district court so held in the Declaratory Judgment. *Flores II*, 172 F. Supp. 2d at 1238.

Our point, boiled down, is that the Superintendent's and Legislative Intervenors' view, if adopted, would effectively repeal the EEOA by replacing its equality-based framework with the gradual remedial framework of NCLB. Such a result is simply not consistent with the text of either the

EEOA or NCLB. There is certainly no express repeal provision in NCLB. Quite to the contrary, NCLB contains a savings clause with regard to civil rights statutes.

Nor did NCLB repeal the EEOA by implication. "[R]epeals by implication are not favored. . . . In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (implied repeals are "not favored" and will only be inferred if "the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have meaning at all") (internal quotations and alterations omitted). Such is not the case here. The goals of the two statutes are complementary, as the saving provision of NCLB for civil rights statutes indicates.

We also cannot agree with the Superintendent and the Legislative Intervenors that this is a case where "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Sen. Admin.*, 425 U.S. 820, 834 (1976). Such cases concern instances where Congress has provided a narrower remedy for a class of harms otherwise covered by an older and more general statute. *See id.* (collecting cases). We have already discussed the quite different focuses of the two statutes. That Title III of NCLB operates in the same general substantive area as the

EEOA is not enough for us to hold that the former was intended to replace the latter, particularly in light of explicit statutory language to the contrary.

Our analysis is further bolstered by the Supreme Court's similar analysis of a purported conflict between a civil rights statute and a general Spending Clause-based statutory grant program, like NCLB, in *Blessing v. Freestone*, 520 U.S. 329 (1997). In that case, the Court considered whether the remedial scheme of Title IV-D of the Social Security Act displaced a right of action under 42 U.S.C. § 1983. *Id.* at 339-40. The Court held that a statute like Title IV-D could displace § 1983 actions in only two ways: "[E]xpressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 341.

There is, as we have noted, no express repeal here. And implied repeals of the remedial displacement kind are very rare, as the Court recognized in *Blessing*. *Id.* at 346-47 (noting only two such instances with regard to § 1983); *see also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (detailing such an instance where the "quite comprehensive enforcement mechanisms" of two federal pollution statutes rendered it "hard to believe" that Congress intended to preserve § 1983 remedy for problems covered by the statutes).

Blessing also explicated an additional reason why NCLB cannot supercede the EEOA: The EEOA

provides an express private cause of action, while NCLB does not. In *Blessing* the Spending Clause statute's "enforcement scheme" was limited because it had "no private remedy — either judicial or administrative — through which aggrieved persons can seek redress." 520 U.S. at 348. The Court held that the substantive statute could not "close the door" on § 1983, because a "plaintiff's ability to invoke § 1983 cannot be defeated simply by the availability of administrative mechanisms to protect the plaintiff's interests." *Id.* at 347-48 (internal quotation and alteration omitted); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("[I]n *all* of the cases in which [the Court has held that a general program did not preempt a § 1983 cause of action] . . .the statute at issue . . . *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated.") (emphases in original); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990) (no repeal where the programmatic statute "contain[ed] no comparable provision [compared to statutes in *Sea Clammers* and similar cases] for private judicial or administrative enforcement"); *Smith v. Barton*, 914 F.2d 1330, 1334 (9th Cir. 1990) ("[T]he doctrine of [*Sea Clammers*] only bars section 1983 claims that *could have been brought* under a separate federal statute which provides remedial devices sufficiently comprehensive to demonstrate a congressional intent to preclude section 1983 claims."); *cf. ASW v. Oregon*, 424 F.3d 970, 977 (9th Cir. 2005) (holding that even some statutes *with* administrative mechanisms to protect plaintiffs' rights cannot preclude § 1983);

Price v. City of Stockton, 390 F.3d 1105, 1115 (9th Cir. 2004) (same).[46] Like the statute in *Blessing*, NCLB does not provide an explicit private enforcement scheme.[47] Applying the holding of *Blessing* and similar cases, the existence of an explicit private enforcement mechanism in one statute but not the other strengthens our conclusion that NCLB did not "close the door," *Blessing*, 520 U.S. at 348, on suits such as this one.

The second argument in this vein made by the Superintendent and the Legislative Intervenors has more merit. That argument is that, after NCLB, an order to perform a statewide cost study of ELL program incremental costs, and fund accordingly,

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[46] The Superintendent also argues that the NCLB should be used to "assist in the interpretation" of the requirements of the EEOA. If he meant only that NCLB compliance is somewhat probative of EEOA compliance, we would agree. He argues, however, that NCLB's statutory scheme "supplemented and defined" the EEOA's "appropriate action" requirement such that compliance with the former is also compliance with the latter. We have just explained why that proposition is not so, and casting it as an argument for modification rather than repeal makes no difference. *Defenders of Wildlife*, 127 S. Ct. at 2533 n.8 ("It does not matter whether this alteration is characterized as an amendment or a partial repeal.").

[47] Because we find the complementary nature of the EEOA and NCLB clear, and because we do not wish to rule on a matter not squarely before us, we do not decide whether NCLB affords an implied right of action, although we note that some courts have concluded that it does not. *See Alliance for Children, Inc. v. City of Detroit Public Sch.*, 475 F. Supp. 2d 655, 658 (E.D. Mich 2007) (collecting such cases).

may not be entirely sensible. While such an order would not be an abuse of discretion, it is true that NCLB's monitoring protocols have encouraged the development of substantial district-by-district data. This data may make it easier, and more sensible, for a state like Arizona to tailor some amount of funding to the particular incremental costs associated with the ELL program in each district, rather than to provide a uniform ELL increment to all districts regardless of the distinct conditions in each district. It appears that the Arizona Constitution would permit some degree of such tailoring. *See Roosevelt I*, 877 P.2d at 814 ("[U]nits in 'general and uniform' state systems need not be exactly the same, identical, or equal."). That point, however, does not avail the Superintendent and Legislative Intervenors, as they did not move for such a limited modification of the judgment. Instead, they argued that the district court should simply grant complete relief from judgment.

In sum, just as no changes in fact have eliminated the premises of the Declaratory Judgment, no changes in law have done so either. The motion for relief from judgment, then, depends on showing that Arizona is, in fact, in compliance. And that question, in turn, depends on HB 2064.

2. HB 2064 and Actual Compliance

Perhaps recognizing the flaws in HB 2064, the Superintendent and Legislative Intervenors begin by arguing that the legality of the statute should not have been considered. That issue, they contend, was "outside" of our mandate on remand.

The contention makes no sense. HB 2064 was enacted as Arizona's effort to comply with the Declaratory Judgment and was so represented to the district court. That this characterization of HB 2064 is correct is indicated in the statute itself, which provides that it will not go fully into effect unless the district court approves the statute as in compliance with its orders. It would be very strange if, on remand, our mandate to survey relevant changes of circumstances excluded such an obvious change.

Certainly, no portion of our mandate forbade such consideration. "[A]lthough lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate." *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000) (quotation omitted). We remanded for the district court to hold an evidentiary hearing and explicitly decided no other issue. The district court held such a hearing.[48] There is no further mandate issue in this case.[49]

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[48] The Superintendent also argues that the district court generally disobeyed the mandate by not making adequate findings of fact and conclusions of law. We disagree. Although the Superintendent might wish that the district court had made different findings and conclusions, the district court nonetheless fulfilled its task sufficiently to satisfy the mandate.

[49] Nor are there problems of ripeness or of forum. True, as the Superintendent and Legislative Intervenors note, it is highly unusual for questions of state compliance with federal school funding law to come before a court in the first instance. The Department of Education has an extensive administrative hearing apparatus, 20 U.S.C. §§ 1234 *et seq.*, and such cases

(Continued...)

Proceeding to the merits of the HB 2064 issue, we hold that the district court's conclusions of law regarding the statute were not abuses of its discretion.[50] The court held that HB 2064's two-year funding cut-off was irrational, rendering it

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would ordinarily originate there. Here, however, HB 2064 was *presented* to the district court as a ground for relief from judgment, and on its face became fully effective only if approved by the district court. As part of its inquiry, the court necessarily had to determine whether, on its face, HB 2064 satisfied the requirements of federal law; if not, the problems it was designed to solve would only be exacerbated. Thus, there are no forum problems here and, as HB 2064 became effective immediately, save for the Group B weights, there is no ripeness issue.

For similar reasons, the Legislative Intervenors' contention that the district court should have certified the question of HB 2064's interpretation to the Arizona Supreme Court is not well taken. They do not propound any substantial question of interpretation that would justify certification, instead only asserting generally that the statute might be "unclear." Yet, under Arizona law, a certification order must set forth "[t]he questions of law to be answered." ARIZ. REV. STAT. § 12-1863. Moreover, the argument was raised for the first time in their reply brief and such arguments are "generally deemed waived." *United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006).

[50] Because the Superintendent and Legislative Intervenors argue that the district court should not have considered the legality of HB 2064 at all on remand, they do not directly argue that HB 2064 satisfies the judgment and so come close to waiving that argument entirely. But because they do argue in the alternative that the district court's decisions on HB 2064 were substantively wrong, they have preserved the issue, and we will consider it.

inadequate to comply with the judgment and that, in addition, several facial violations of federal law further compounded the statute's problems. *Flores XI*, 480 F. Supp. 2d at 1166. We agree.[51]

First, and most clearly, HB 2064's two-year funding cut-off alone renders the law inadequate as a funding scheme rationally grounded in the costs of providing ELL programs, as the district court held. *Flores XI*, 480 F. Supp. 2d at 1166. There is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction:

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[51] Whether the district court could have declared Arizona to be in compliance immediately upon the passage of HB 2064 even if the law was facially appropriate is not entirely clear, although we do not decide the matter. Under the *Castaneda* framework adopted by the district court:

> If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

Castaneda, 648 F.2d at 1010. HB 2064 itself suggested that the court might allow the statute to be implemented "on an interim basis . . . to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs." HB 2064 § 15(A).

Instead the evidence is squarely to the contrary, as all witnesses testified that some students would certainly take longer than two years to become proficient in English. Yet funding for both the Group B weights and the Arizona structured English immersion fund is unavailable after two years. *See* ARIZ. REV. STAT. §§ 15-756.01(J), HB 2064 § 6. All that remains thereafter is compensatory instruction funding, *see* ARIZ. REV. STAT. § 15-756.11, which cannot be used to support "normal classroom instruction." ARIZ. REV. STAT. § 15-756.11(G). To cut funding to children who have not yet learned English after two years of instruction, providing only for compensatory instruction — which cannot occur during class-time and so leaves the incremental costs of assistance for such children during the regular school day unfunded — cannot comply with the judgment. The district court did not abuse its discretion by holding HB 2064 inadequate in this regard.

Second, as we have discussed above, the district court did not clearly err in holding that HB 2064's Group B weight increase alone was not sufficient to meet the incremental costs of ELL programming. *Flores XI*, 480 F. Supp. 2d at 1162. The two grant programs created by HB 2064 might, however, be able to make up the gap between the incremental costs and the Group B weights, as the district court found, *id.*, and so these secondary programs become important to our analysis. It is, first, important to note that these grant programs will be of no significance at all unless they are funded and, as we have noted, the statute does not require that any

appropriations be made for either program in coming years, although it does provide an initial appropriation for the compensatory instruction fund. But even if the programs are funded, they do not well serve Arizona's effort at compliance.

Specifically, the district court held that HB 2064 cannot comply with the judgment because its grant programs violate several provisions of federal education funding law. *Id.* at 1166. Penalties for such violations include limitations on further grants and, in some cases, requirements that states pay back some or all of the grants they have already received. *See* 20 U.S.C. §§ 1234 *et seq.* If such violations are present, HB 2064 cannot be adequate relief. Its implementation would imperil federal funds for both non-ELL and ELL students.

The clearest violation of federal law discussed by the district court is the state's violation of 20 U.S.C. § 7902, which, covering all of the pertinent federal grant programs, provides that "[a] State shall not take into consideration payments under this chapter (other than under subchapter VIII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children." The Declaratory Judgment in this case is directed at the funds distributed by the state to local educational agencies, so § 7902 is applicable. And HB 2064 manifestly requires that federal funds be considered with regard to distribution of funds from both the structured English immersion fund, *see* ARIZ. REV. STAT. §§ 15-756.01(I)(1)-(3), and the

compensatory instruction fund, *see* ARIZ. REV. STAT. § 15-756.11(E).[52] HB 2064 therefore violates 20 U.S.C. § 7902 on its face.

The Legislative Intervenors offer only one counterargument on this point, which we do not find persuasive: They suggest that "free public education," as used in 20 U.S.C. § 7902, is defined in relation to state law and that, under Arizona law, the term does not apply to ELL programs. So, they contend, 20 U.S.C. § 7902 does not apply to HB 2064's programs.

The federal definition of "free public education" is "education that is provided - (A) at public expense, under public supervision and direction, and without tuition charge; and (B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any education provided beyond grade 12." 20 U.S.C. § 7801(21). The provision relies only on state law to define "elementary or secondary school education," *not* "free public education," and thus defers to states with regard to which *grades* are embraced by the definition — not with regard to subject areas or services. That the "as determined under applicable State law" provision applies only to

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[52] The district court so held only with regard to the Arizona structured English immersion fund. Compensatory instruction fund monies, however, may not be allocated to "supplant any federal . . . monies . . . budgeted for [E]nglish language learners as of February 23, 2006." ARIZ. REV. STAT. § 15-756.11(E). That provision is therefore also in violation of federal law.

subsection (B) of the definition is indicated by the absence of a comma after "secondary school education;" by the existence of an "except" clause after the "as determined" phrase that pertains directly to subsection (B); and by the absurd results that would flow from the Superintendent and Legislative Intervenors' reading: Under their interpretation, states could define entire subjects or programs out of the federal funding statute's reach by changing their state definitions of "free public education."

In any event, we find nothing in Arizona law to suggest that ELL programming is, in any sense, not part of a "free public education" in Arizona. The very existence of HB 2010 and HB 2064, and of the Group B weighting program, indicates otherwise.

In sum, the district court did not abuse its discretion in concluding that HB 2064 does not constitute compliance.[53]

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[53] The district court also held that HB 2064 facially violates the "supplement not supplant" provisions of many federal education funding statutes. *Flores XI*, 480 F. Supp. 2d at 1166. These provisions ensure that federal funds are truly additional to state funds by providing that federal efforts are to add to state programs, rather than simply replacing state funds with federal money without actually increasing existing efforts. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 659 (1985) (discussing Title I "supplement not supplant" provision); *Dep't of Educ., State of Hawaii v. Bell*, 770 F.32 1409, 1413 (9th Cir. 1985) (same).

(Continued...)

We therefore affirm the district court's holding that HB 2064 does not warrant relief from judgment.[54] Indeed, to the extent that improved conditions in NUSD might somewhat support relief from judgment, HB 2064's flaws largely negate their import: The stark two-year cut-off it creates on all of Arizona's ELL funding (save for compensatory instruction funds which are no substitute for funding for day-to-day instruction) combined with the very real possibility that the funding scheme may trigger

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Because the two-year funding cut-off and the violation of 20 U.S.C. § 7902 each alone render HB 2064 insufficient to justify relief from judgment, we need not decide whether the district court correctly decided the "supplement not supplant" question, or whether, as the moving parties argue, it did so prematurely because the local educational entities have not yet spent any money. As we have explained, it is quite uncommon to confront whether a state funding statute complies with federal educational funding law in the first instance. *See* 20 U.S.C. §§ 1234 *et seq.*; *see also Bell v. New Jersey*, 461 U.S. 773, 791-92 (1983) (discussing the Department of Education's auditing process and holding that the "existence and amount of liability [under such provisions] are committed to the agency, in the first instance"). Doing so here was made necessary by the unusual circumstance that HB 2064's compliance with the Declaratory Judgment turns in part on such questions. But we need not decide more than is required. The somewhat more complicated issues raised by the "supplement not supplant" provisions are not necessary to our inquiry, so we do not decide them.

[54] Flores and Arizona argue that HB 2064 also violates federal law by requiring offsets of federal impact aid monies, *see generally* 20 U.S.C. §§ 7701 *et seq.*, and of school district desegregation monies. Because the district court addressed neither question, we do not reach these issues.

federal enforcement action, may well retard or reverse whatever progress has been made. So, to the extent that circumstances have changed after HB 2064, due to these two flaws they changed in large measure for the worse.

We note, however, that the district court has recently spoken again to this issue in its current contempt order, *Flores XII*, No. CV-92-596 (D. Ariz. Oct. 10, 2007), indicating that, despite HB 2064's flaws, Arizona may be nearing compliance. In that order, the court again noted the problems with HB 2064 that we have discussed but emphasized that, in its view, they could be cured by abandoning the two-year cut-off and by declining to consider federal funds in the grant-making process. *Id.* at 3-4. The model-based funding structure of the statute itself, the court held, was not at variance with the Declaratory Judgment, and the incremental costs data that districts are required to submit would, save for the flaws we have noted, enable Arizona "to rationally fund the new models for the ELL programs." *Id* at 4.[55] There is reason, then, to hope, if the models are in fact funded and the two changes noted by the district court in its most recent order are made, that this dispute, which has been in the courts longer than it takes a student to go from kindergarten to college, may finally be nearing resolution.

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[55] We do not, of course, express any view on the merits of the district court's contempt order, as it is not before us in this appeal.

Appendix A

III. CONCLUSION

Arizona did not appeal the original judgment and has not complied with the Declaratory Judgment or with the bulk of the post-judgment relief orders. For all the reasons we have given, it is not inequitable to continue to require compliance. We therefore affirm the district court.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRIAM FLORES, individually, and as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child,
Plaintiffs-Appellees,

v.

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities,
Defendants-Appellees,

THOMAS C. HORNE, Superintendent of Public Instruction,
Defendant-Appellant,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Intervenors.

No. 07-15603
D.C.No.
CV-92-00596-RCC
District of Arizona,
Tucson

Appendix B

MIRIAM FLORES, individually, and as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child,

Plaintiffs-Appellees,

v.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Intervenors-Appellants,

and

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities, THOMAS C. HORNE, Superintendent of Public Instruction,

Defendants.

No. 07-15605
D.C.No.
CV-92-00596-RCC
District of Arizona,
Tucson

ORDER

Appendix B

Filed April 17, 2008

Before: Betty B. Fletcher, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

ORDER

The full court has been advised of the petitions for rehearing en banc. No judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). Judges Berzon and Rawlinson voted to deny the petitions for rehearing en banc and Judge Fletcher so recommended.

The panel has voted to amend its opinion and to deny the petitions for rehearing with the following amendment.

The opinion filed February 22, 2008 and published at 516 F.3d 1140 is amended as follows:

On page 1178, add the following paragraph to footnote 52 following the last sentence of the footnote:

> Our conclusion is unaffected by 20 U.S.C. § 6321(d), which provides an exception to some federal fiscal requirements for a narrow class of state funds expended for programs benefiting disadvantaged children. Arizona receives funding from several other federal programs. We need not decide if § 6321(d) could ever affect the

application of § 7902, because § 15-765.11(E)'s consideration of federal funds is not limited to funds covered by § 6321(d). So, even if the exception were relevant here, it would not excuse Arizona from complying with federal fiscal requirements which it does not cover and § 15-756.11(E) would thus still violate § 7902. In any event, it is far from clear, although we need not decide the matter, that the compensatory instruction funds would be covered by the exception in the first place. *See* 20 U.S.C. § 6321(d) (limiting the exception to "supplemental State . . . funds expended . . . for programs that meet the intent and purposes of this part"); *see also* 34 C.F.R. § 200.79 (defining the boundaries of the "intent and purposes" exception).

* * *

No further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue in due course.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of Miriam Flores, a minor child, et al., Plaintiffs, vs. STATE OF ARIZONA, et al., Defendants.	Case No. CIV-92-596-TUC-RCC **ORDER**

On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064 ("HB 2064") (Docket No. 373) and Defendant State of Arizona filed a Motion to Expedite Consideration of State's Motion for Accelerated Consideration of Legislation (Docket Nos. 374-375). On March 8, 2006, the Court held a telephonic status hearing and requested the parties to brief the Court on HB 2064 to determine if HB 2064 satisfied both the December 2005 Court Order and the January 2000 Judgment in this matter.

On April 3, 2006, a hearing was held and the Court took the case under advisement. The Court considered the following memorandum and

supporting documents: Defendant Thomas Horne's Memorandum in Support of the Act (Docket No. 414); Defendant State of Arizona's Opening Brief (Docket No. 415); Plaintiff Miriam Flores' Brief Regarding Sufficiency of House Bill 2064 (Docket No. 419); Amicus Arizona School Boards Association's Brief *Amicus Curiae* Brief (Docket No. 425); Amicus House and Senate Democratic Caucuses of the Arizona Legislature's Brief (Docket No. 427); Plaintiff Miriam Flores' Brief (Docket No. 428); and Intervenor Parties Speaker of the House/President of the Senate's Brief Replying to Opening Briefs of Plaintiffs and Attorney General (Docket Nos. 422 and 434). As a result, this Court held that HB 2064 did not satisfy the January 2000 Order and Judgment ("January 2000 Order") or the December 2005 Order and denied the Intervenor's Motion to Purge Contempt, Dissolve Injunctions, Declare Orders Satisfied, and Set Aside Injunctions.

On April 25, 2006, the Court entered an order holding that HB 2064 did not bear a rational relationship to the cost of providing ELL Programs, as required by this Court's January 2000 Order. The Court's April 2006 Order (Docket No. 448) was based on the following identified problems with the new law:

1. The Act does not comply with the Court's original Judgments and Orders.

2. On its face, the Act does not appropriately fund the ELL program.

3. The Act fails to delineate the cost of providing a viable ELL program.

4. The Act does not explain the basis for the $77 increase for Group B weight students or how the $432 appropriation is rationally related to the ELL program.

5. The $432 appropriation is more than current funding, however it is less than the amount that was discredited in a "cost study" that was done more than eighteen years ago, and less than the amount that was determined by the now "discredited cost study" held two years ago.

6. Based on the Act, there is no way to determine if the models are indeed standards for school districts and charter schools to follow.

7. The two-year limitation is a violation of federal law. And,

8. The offsets of federal funds such as Title I, IIA, III, Impact aid and desegregation monies also violate federal law.

On July 31, 2006, the Ninth Circuit Court of Appeals reversed this Court's Orders holding the Moving Defendant's [sic] in contempt and rejecting House Bill 2064 ("H.B. 2064") and remanded to the District Court with instructions to hold an evidentiary hearing and make findings of fact regarding whether "changed circumstances" required modification of the original court order pursuant to Rule 60(b)(5). The Court held an eight day evidentiary hearing, beginning on January 9, 2007. The parties presented live testimony and stipulated

to admit into evidence most exhibits. The trial addressed only one specific issue. The following issue was tried: whether funding and programmatic changes that have occurred since the January 2000 Order in this case warrant a modification of that judgment or otherwise bear on the appropriate remedy in this case. The Court has considered all the testimony and exhibits, the briefs filed before and after the hearing as well as the findings of fact and conclusions of law by all parties.

This Court's Order will be as brief as possible as the Court promised the parties a speedy ruling so that the State Legislators could take action before its scheduled adjournment if needed. It is the contention of the Superintendent and the Legislative Intervenors that the Court's January 2000 Order has been satisfied. Specifically, the moving Defendants state that "changed circumstances" in the Nogales Unified School District ("NUSD") has satisfied the original January 2000 Order and obligates the Court to at least modify or vacate that original order. The moving Defendants put forth what they contend to be the "stellar" successes of NUSD and supposedly great strides taken by the State to comply with the Court's Order.

There is no doubt that NUSD is doing substantially better than it was in 2000. The State's superintendent of schools is doing better than it was in 2000 with regards to its role in making sure that children receive quality education. The Arizona Department of Education ("A.D.E.") is doing much more than it was in 2000, with regard to creating

standards, norms and oversight for Arizona's public schools and students with regard to ELL programs. It is apparent that the A.D.E. has taken its role seriously and is endeavoring to establish appropriate standards and goals for all students in Arizona. It should be noted that it would be premature to make an assessment of some of these changes. Indeed, many of the new standards are still evolving. Unfortunately, the moving State Defendants and Legislative Intervenors [sic] are not doing better as it pertains to satisfying the original Court Order.

The strides made by NUSD have been made largely as a result of their efforts alone. The State Superintendent and State Legislators sing the praises of Mr. Kelt Cooper - he was called Super Cooper due to his efforts in the NUSD - and his noted achievements during his tenure as Superintendent for NUSD however, he is but one person and is no longer employed by NUSD. The success or failure of the children of NUSD or any other School district should not depend on having a "Super Cooper" at the helm. The State must establish clear rules and requirements that can be fulfilled and followed, no matter who is in charge.

Several claims were made suggesting that NUSD is doing well, however NUSD's success is fleeting at best, particularly as it pertains to NUSD's high school students. It is great that children in elementary and middle school are doing better however, that is not sufficient. Success must also include the high school students of NUSD. Currently, this is not being accomplished.

Appendix C

All parties agree that learning English doesn't take place in a vacuum. Also, all parties agree that it takes a number of resources and often more than two years to achieve success in any ELL program. Plaintiffs argue that the impetus for success in NUSD was greatly attributed to the raising of their ELL program costs, which were $1,570.00 more than the base level funding normally provided by the State. The moving Defendants argue that the successes at NUSD qualify as "changed circumstances" and ask the Court to lift its sanctions. However, NUSD's changed circumstances had little or nothing to do with any help from the moving Defendants themselves.

By increasing the standards of accountability, the Federal No Child Left Behind Act ("NCLB") has to some extent significantly changed State educators approach to educating students in Arizona. In order to receive funding, NCLB requires certain adequate yearly progress to be made by each public and charter school. NCLB also requires States to create and [sic] accountability system of assessments so that public schools can continually receive funding. NCLB also reaffirms the requirement of the State to effectively educate non-English speaking students.

Just as the State has to consider all school districts when coming up with funds for a single district like NUSD, it is impossible to limit the effects of the judgment and the Court's Order to NUSD. While the Court has heard testimony regarding the cost of programs other than the programs at NUSD, the Court findings are based

upon the evidence of what exists in NUSD except where specifically stated otherwise.

The parties are aware that this Court analyzed HB 2064 last spring and does so again here for the purpose of determining whether or not the Court's January 2000 Order has been satisfied. It should be noted that the Court finds the same problems today that it saw last year, because HB 2064 is the same, the problems themselves are the same. The parties are to refer back to the April 2006 Order (Docket No. 448) for the Court's reasoning.

The Court having heard the testimony and having examined the evidence offered by the parties, and having heard the arguments of counsel and being fully advised herein, the Court now finds generally in favor of Plaintiffs and against Defendants, and hereby makes the following special Findings of Fact and Conclusions of Law pursuant to Federal Rules of Procedure, Rule 52(a) and (c) as well as Rule 60(b)(5) which constitutes the decision of the Court herein:

FINDINGS OF FACT

To the extent these Findings of Fact are also deemed to be conclusions of law, they are hereby incorporated into the Conclusions of Law that follow.

1. At the time of this Court's judgment in January 2000, the State funded ELL instruction by adding a per-student amount (the "Group B weight") for every ELL student in a school district or charter school to the amount of per-student funding provided for English proficient students.

2. Since 2000, the State has changed its primary model of ELL instruction from bilingual education to structured English immersion.

3. The State has also increased generally available funding for schools programs, facilities, and teachers. It has also used federal grant money to provide for additional, short-term assistance with reading instruction to some at-risk schools, including four in the Nogales Unified School District ("NUSD").

4. ELL students need extra help and that costs extra money. (Tr. 1/8/07 at 101.) The process for funding ELL instruction in the State now and for the foreseeable future, absent some further legislative enactment, is controlled by HB 2064, which attempts to meet the requirement of the EEOA by calculating and funding the "incremental costs" of ELL instruction, which are statutorily defined as "costs that are associated with a Structured English Immersion program pursuant to section 15-752 or a program pursuant to section 15-753 and that are in addition to the normal costs of conducting programs for English proficient students." A.R.S. § 125-756.01(L)(2) [sic].

5. HB 2064 adds an additional sum to the Group B weight, which, if it were currently effective would raise funding per ELL student from approximately $365 to approximately $444. (Tr. 1/17/07 at 67-68.) This additional sum will not be provided unless and until this Court issues an order approving HB 2064 as a response to this Court's January 2000 judgment, which it has not done. (HB 2064 § 14.)

6. Beginning in the 2007-08 school year, HB 2064 institutes a system of cost-based funding using instructional models to be developed by a task force. A.R.S. § 15-756.01(C).

7. Under the new law, school districts and charter schools will choose from among the approved instructional models, A.R.S. § 15-756.02, and calculate the incremental cost of implementing that mode in their district or school, A.R.S. § 15-756.01(H).

8. Depending on the amount of the incremental cost of the chosen instructional model, a school district or charter school may be able to request additional funds to cover that cost from the Structured English Immersion ("SEI") Fund. A.R.S. § 15-756.01(I).

9. The amount of the allowable SEI Fund request is limited. (*Id.*) Before requesting funds, districts and schools must deduct from the calculated incremental cost, (1) the Group B weight, (2) all federal Title III monies they receive, (3) a proportionate share of the federal Title I and IIA monies they receive, (4) a proportionate share of the federal impact aid monies they receive, and (5) a proportionate share of their desegregation funds. (*Id.*) Only if they still have unmet incremental costs after applying all of those funding sources may they request monies from the SEI Fund, and only in that limited amount.

10. The Plaintiffs presented evidence that the per-student incremental cost of providing ELL

instruction is greater than either the current Group B weight of $365 or the increased weight of $444 that would be provided if this Court approved HB 2064, both in NUSD and in other districts. (Exs. 7, 9, 10, 14; Tr. 1/18/07 at 59-60; Tr. 1/24/07 at 117, 131; Tr. 1/25/07 at 15-16; Tr. 1/25/07 at 148, 156.) Therefore, the SEI Fund provisions of A.R.S. § 15-756.01(I) will govern the total amount of funding received by NUSD and other districts and schools to educate their ELL students.

11. Federal funds available under the Title I, IIA, and III programs are designed to provide additional educational resources for at-risk students, not to subsidize any obligation the state may have to educate those students. (Tr. 1/9/07 at 12.) Grants of federal funds therefore carry a restriction on "supplanting," or the substitution of federal funds for the funds a state would otherwise have spent on a program in the absence of the federal funds.

12. The amount of federal funds Arizona received or expects to receive under the No Child Left Behind Act totals $575,714,495 and $582,931,537 for fiscal years 2006 and 2007, respectively. (Tr. 1/9/07 at 173 & Ex. 305.) The largest portions of these funds are for Title I programs in the amounts of approximately $289,000,000 and $295,000,000 for fiscal years 2006 and 2007, respectively. (*Id.*) The supplement not supplant restriction goes to the core purpose of Title I, which is to make certain that children in high poverty schools [receive] extra services. (Tr. 1/9/07 at 166.)

13. The State agrees, in writing, to comply with this restriction on supplanting as a condition of receiving federal funds. (Ex. 300.) It also agrees to ensure that any school districts to which it provides subgrants will also refrain from supplanting. (*Id.*) To that end, the State requires districts receiving federal funds to sign an agreement that they will not use federal funds to supplant state educational funds. (*See, e.g.*, Tr. 1/25/07 at 72-73.)

14. A state found to have used federal funds to supplant state educational expenditures faces the prospect of being required to return the misused funds and may lose future eligibility for federal funds under those programs for all students. (Tr. 1/9/07 at 174-75, 183.) In Arizona, the potential loss of federal funds is substantial, as the State receives approximately $600 million per year. (*Id.* at 183.)

15. Thomas Fagan, a 29-year veteran of the United States Department of Education and an expert on Title I funding testified, referring to HB 2064, that he had "never seen such a blatant violation" of supplement not supplant restrictions. (Tr. 1/9/07 at 162-64 & 186.)

16. HB 2064 also imposes a time limit on funding available to school districts and charter schools for the education of their ELL students. After a student has been classified as an ELL for more than two years, funding for English language instruction provided to that student is cut off. A.R.S. § 15-756.04(C). The district or school will continue to receive base level funding for the student, just as it receives for English proficient students, but it will

not receive either the ELL Group B weight or any [additional monetary support] from the SEI fund to meet the incremental cost of providing structured English immersion instruction to that student. *Id.*

17. The district or school may still receive compensatory instruction funds for students who do not reach English proficiency within two years, but those funds are not guaranteed or formula-based, and the statute permits compensatory instruction funds to be used only for services apart from normal classroom instruction. A.R.S. § 15-756.04(C), § 15-756.11(G). (*See also* Tr. 1/11/07 at 132.) Under HB 2010, the predecessor to HB 2064, compensatory instruction funds could be used to improve academic proficiency and English language proficiency. (Tr. 1/10/07 at 130-31.) HB 2064 limits the use of compensatory instruction funds to improving English language proficiency. (*Id.*)

18. Because of the two-year cutoff, districts and schools will have to bear the incremental costs of normal classroom instruction for ELL students who take longer than two years to attain English proficiency. Alternatively, they will have to dilute their remaining Group B weight funds to cover these students as well. In NUSD that would effectively reduce the district's Group B weight funds from $365 to $182. (Tr. 1/17/07 at 68.)

19. HB 2064 also limits the availability of C.I.F. for reclassified English proficient students to only the first two years after they are reclassified. A.R.S. § 15-756.11(G). The use of compensatory instruction funds is limited to improving English

language proficiency even though reclassified students are, by definition, proficient in English. (Tr. 1/11/07 at 134-35.)

20. No distributions have been made from the $10,000,000 compensatory instruction fund created by HB 2064. On a per ELL student basis, the fund provides $74 per student (Tr. 1/17/07 at 69-70.)

21. Many students may attain English language proficiency within two years, but two years of ELL instruction is insufficient for many English Language Learners.

22. On average, it takes ELL students in the NUSD four to five years to be reclassified as English proficient. (Tr. 1/18/07 at 17-18; *see also id.* at 40.) Tucson Unified School District ELLs spend an average of 4.6 years in ELL programs. (Tr. 1/24/97 at 204.) In the Murphy Elementary School District, 86% of exited students took more than two years to achieve English language proficiency. (Tr. 1/25/07 at 163-64, 168-70, 172-73; Ex. 16.) Proficiency within two years is the exception in the Scottsdale Unified School District. (C. Rivera Depo. at 67.) And in the Glendale Union High School District, 46% of the ELL students in Glendale High School and 15% of those at Sunnyslope High School take more than two years to achieve English language proficiency. (Docket Entry 614, Plaintiffs Notice of Filing Exhibit)

23. The Defendant-Intervenors and the Defendant Superintendent of Public Instruction

(collectively, the Moving Parties) did not present any evidence that two years is a sufficient amount of time for all ELL students to attain English language proficiency.

24. The State does not currently have data as to the statewide average for how long students are classified as ELLs before they exit the system. (Tr. 1/11/07 at 112.)

25. Those of the Moving Parties' witnesses who addressed the subject were unanimous in their opinion that at least some students will not reach English language proficiency in two years.

26. The Moving Parties' expert, Rosalie Porter, testified that achieving English language proficiency takes approximately two years, but "some children will certainly require more time." (Tr. 1/8/07 at 110 & 128.) She also testified that services and funding for those children should not be cut off. (*Id.* at 127.)

27. Irene Moreno, who is in charge of the English Acquisition Services section of the Arizona Department of Education testified that people "that have been in the system" believe students become proficient in English "generally anywhere from two to three years." (Tr. 1/10/07 3 at 11.) She also testified that the one model for ELL instruction developed by her group "allows for the possibility that students are going to take longer than two years." (*Id.* at 103.)

28. The former superintendent of NUSD, Kelt Cooper, testified that he "would think that

within three years a bright young person with a great deal of support could probably be pretty good at a second language, but I'm comfortable with three years being fairly strong." (Tr. 1/11/07 at 85.) He was not comfortable with a one or two year time period. (*Id.* at 107.)

CONCLUSIONS OF LAW

1. To the extent any of these Conclusions of Law contain findings of fact, they are hereby incorporated into the Findings of Fact above.

2. The [Federal] Equal Educational Opportunities Act ("EEOA") requires the State "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f).

3. In order to satisfy the mandate of the EEOA, the State may choose any legitimate established or experimental instructional method; the Court will not interfere with the State's choice from among legitimate available models of language instruction. *See Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

4. Once the State has chosen an instructional method, it must provide sufficient funding to implement that method. *Id.*

5. It is in this regard that this Court found the State's actions deficient under the EEOA in its January 2000 judgment. The Court found that the State had not adequately funded ELL programs in the Nogales Unified School District, as demonstrated

by inadequate resources available to educate ELL students in that district, and that the State had failed to fund ELL programs in a manner rationally related to the cost of providing the State's chosen instructional model.

6. While this Court's January 2000 findings of fact and conclusions of law identified certain specific areas in which the NUSD ELL educational program was lacking, such as classroom size and materials, mere amelioration of those specific conditions is inadequate to comply with this Court's judgment and subsequent orders. Rather, compliance would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction.

7. The Intervenor Defendants, joined on remand in this argument by the Superintendent, contend that there has been a sufficient change in the underlying factual circumstances that justifies setting aside this Court's 2000 judgment as satisfied and ending judicial supervision over this case.

8. The movants' burden is defined by the procedural rule under which they seek relief - Federal Rule of Civil Procedure 60(b)(5). That rule provides that relief from a judgment may be had if "the judgment has been satisfied, released, or discharged, reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

9. Rule 60(b)(5) provides relief from final judgments where a "significant change in facts or

law warrants revision of the decree." *Bellevue Manor Assocs. v. U.S.*, 165 F.3d 1249, 1255 (9th Cir. 1999) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). There must be a showing that "it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with [its] terms." *Rufo*, 502 U.S. at 383); *see also Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J. dissenting) ("[R]eligitation [sic] of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom.").

10. To prevail on a Rule 60(b)(5) motion, the movant must "satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree." *U.S. v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir. 2005)(citing *Rufo*, 502 U.S. at 384). If the movant meets that burden, it must show that its proposed modification of the decree is "suitably tailored to resolve the problems created by the changed factual or legal conditions." *Id.* (citing *Rufo* at 391.)

11. A movant who cites significantly changed factual conditions "must additionally show that the changed conditions make compliance with the consent decree 'more onerous,' 'unworkable,' or 'detrimental to the public interest.'" *Id.* (citing *Small v. Hunt*, 98 F.3d 789, 785 [sic] (4th Cir. 1996) and *Rufo* at 384).

12. The movants in this case have attempted to demonstrate that the judgment has been satisfied, relying both on (1) evidence about new

methods and funding sources in place now that did not exist in the State in 2000 and (2) HB 2064 as a funding method that satisfies the legal requirement that funding be rationally related to the actual cost of ELL programs. In such cases, the Court must evaluate whether changes in the defendants' activities are "so significant as to warrant an end of court supervision." *See Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). While an extended period of voluntary compliance is "a factor supporting termination of an injunction. . .more is required." *S.E.C. v. Coldicutt*, 258 F.3d 939, 943 (9th Cir. 2001).

13. HB 2064, which currently controls ELL instructional funding violates federal law.

14. HB 2064 takes into consideration federal funds received under the Elementary and Secondary Education Act ("ESEA"), in violation of 20 U.S.C. § 7902. A.R.S. § 15-761.01 determines the amount of funding available to districts and schools to fund the incremental costs of educating ELL students in a calculation that depends on the amount of ESEA funds that district or school has received. This is absolutely forbidden under federal law and this Court therefore cannot approve HB 2064's funding system.

15. Because HB 2064 attempts to meet the State's obligation to fund ELL instruction with federal funds that cannot be so used, it does not comply with the EEOA. HB 2064 does not provide for full State funding of ELL instructional costs. Rather, it subtracts a proportionate share of the federal funds received by a district or school from the

amount that that district or school will receive. A.R.S. § 15-756.01(I).

16. The federal laws governing use of the Title I, IIA, and III funds at issue expressly forbid the State from using those funds to "supplant," or replace, funds that the State would otherwise provide. 20 U.S.C. § 6314(a)(2)(B) (Title I funds for schoolwide programs); § 6315(b)(3) (Title I funds for targeted programs); § 6613(f) (Title IIA grants to states); § 6623(b) (Title IIA subgrants to local educational authorities); § 6825(g) (Title III funds). HB 2064 violates these supplement not supplant restrictions. Therefore, a district or school whose incremental costs exceed the Group B weight provided to all schools will face the choice of violating federal laws governing the use of their federal funds, thereby jeopardizing both those funds and eligibility for future federal funds, or underfunding its ELL instructional programs. Neither scenario represents compliance with the EEOA.

17. These violations of federal law jeopardize the entire stream of federal educational funds available to the State's students, a sum of almost $600 million per year. Withdrawal of eligibility for those funds, or an order that the State repay them in whole or part, would have serious detrimental consequences for all Arizona students, including ELL students.

18. HB 2064 imposes an impermissible two-year limitation on funding for ELL instruction, cutting off all funding for the incremental cost of ELL classroom instruction, including the Group B

weight. The EEOA does not permit time limits or restrict the State's obligation to ELL students to two years. The evidence showed that some ELL students need more than two years to become proficient in English. As a result, HB 2064 fails to fund each year of ELL instruction necessary to attain proficiency.

19. For all these reasons, the funding mechanism put in place by HB 2064 fails to comply with the EEOA. HB 2064 fails to satisfy this Court's judgment because it does not provide funding for ELL instruction, for all ELL students, that is rationally related to the cost of that instruction. Instead, it systematically underfunds ELL instruction by impermissibly considering and deducting federal funding amounts that cannot be used for those purposes and by imposing a two-year limitation on the funding available for any student.

20. Rule 60(b)(5) relief is only available under limited circumstances where the moving party can establish (1) a significant change in the facts or the law warrants revision of the decree, (2) changes in the defendants' activities are so significant as to warrant an end of court supervision, (3) changed conditions make compliance with the consent decree more onerous, unworkable, or detrimental to the public interest, and (4) the moving party's proposed modification of the court's decree is suitably tailored to resolve the problems created by the changed factual or legal conditions. The Moving Parties failed to satisfy any of these prerequisites to Rule 60(b)(5) relief.

Appendix C

CONCLUSION

On January 24, 2000, this Court held that the State's minimum funding level for ELL programs was arbitrary and capricious and bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic standards. *See Flores v. State of Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000). More than 7 years later, circumstances in this regard remain the same. The Moving Parties have not shown compliance with this Court's decree, much less changed circumstances that would warrant modification or dissolution of this Court's order.

Accordingly,

IT IS HEREBY ORDERED that the Court finds in Favor of the Plaintiffs.

FURTHER, IT IS ORDERED that the Court finds that the moving Defendants failed to satisfy the requirements pursuant to Rule 60(b)(5) for relief.

FURTHER, IT IS ORDERED that the State has until the end of the current Legislative Session to comply with the Original Order.

Dated this 22nd day of March, 2007.

/s/
Raner C. Collins
United States District
Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al.,	)	No. CV92-596-TUC-RCC
	)	**ORDER**
Plaintiffs,	)	
vs.	)	
STATE OF ARIZONA, et al.,	)	
Defendants.	)	

Lynne Christensen Adams, Office of Atty. Gen., Phoenix, AZ, for Eugene Hughes, David Silva, Claudine Bates Arthur, John Hosner, Ken Bennett, Ray Kellis, Morrison Warren, State of Arizona.

Elliott Talenfeld, Lynne Christensen Adams, Office of Atty. Gen., Phoenix, AZ, Gretchen Schneidau, Office of Atty. Gen., Phoenix, AZ, for Jim Allman.

Timothy Michael Hogan, Arizona Ctr for Law in the Public Interest, Phoenix, AZ, for Miriam Flores, Rosa Rzeslawski.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MARQUEZ, Senior District Judge.

August 20, 1992, Plaintiffs filed this action seeking declaratory relief against the Defendants for

failing to provide limited English proficient (LEP) children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students. *See Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) (failure to provide English instruction to students of Chinese decent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000d). Plaintiffs charge that the Defendants fail to adequately fund, administer and oversee the public school system in districts enrolling predominantly low-income minority children, and that Defendants allow these schools to provide less educational benefits and opportunities than those provided to students who attend predominantly anglo-schools.

On August 28, 1997, this Court certified the case as a class action law suit and defined the class as follows: all minority "at risk" and limited English proficient children (LEP), now or hereafter, enrolled in Nogales Unified School District (NUSD), as well as their parents and guardians." (Order filed August 28, 1997 at 4-5.)

After an arduous history, which has previously been described in detail (Order filed April 14, 1999 at 7-13), the Court dismissed Plaintiffs' claim under 42 U.S.C. § 1983, but held that Plaintiffs' LAU claims could proceed under the Equal Education Act of 1974

(EEOA), (Title 20 U.S.C. § 1703(f)),[1] and that Plaintiffs' disparate impact claim could be brought under the implementing regulations. (34 C.F.R. Part 100), for Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000d).[2] (Order filed April 14, 1999 at 2-7.) The Court set the matter for trial to determine whether Defendants fail to provide adequately for the instruction of LEP students and other "at risk" minority students attending public school systems in districts like NUSD. (Order filed April 14, 1999 at 11.)

The Court held a three-day bench trial, beginning on August 16, 1999. The parties presented live testimony and stipulated to admit into evidence

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[1] The EEOA provides as follows:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by-
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.
>
> 20 U.S.C. § 1703.

[2] Title VI provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> 42 U.S.C. § 2000d.

all exhibits. The trial addressed only two specific issues because the parties reported that a Consent Decree disposed of the majority of Plaintiffs' LAU claims. (Minute Entry August 18, 1999.) The following issues were tried: 1) whether or not Defendants' adequately fund and oversee the LAU program in NUSD, and 2) whether or not the AIMS test disparately impacts minority students at NUSD. Plaintiffs' Second Amended Complaint did not include the AIMS challenge; nevertheless, the Court heard the parties' arguments and finds that Plaintiffs failed to present evidence at trial to make a prima facie case of disparate impact. Accordingly, the Court considers the evidence regarding academic performance only as it is indicative of deficiencies in Plaintiffs' education.

The cause having come to trial, before the Court sitting without a jury, with Timothy M. Hogan and William Morris appearing as counsel for Plaintiffs, and Roger W. Hall appearing as counsel for Defendants, the State of Arizona, et. al.;

The Court having heard the testimony and having examined the proofs offered by the parties, and having heard the arguments of counsel and being fully advised herein, the Court now finds generally in favor of Plaintiffs and against Defendants, and hereby makes the following special Findings of Fact and Conclusions of Law pursuant to Federal Rules of Civil Procedure, Rule 52(a) and (c) which constitutes the decision of the Court herein:

Appendix D

FINDINGS OF FACT

To the extent these Findings of Fact are also deemed to be Conclusions of Law, they are hereby incorporated into the Conclusions of Law that follow.

1. The public elementary and secondary schools of Arizona, including NUSD, are financed by a combination of revenues from local, county, state and federal sources. Federal funding sources make up a very small percentage of total funds for Arizona's schools. For example in 1991-1992, federal revenues were only 6.5% of the State's total school revenues. In main part. [sic] Arizona School Districts are funded from local and state revenues. (Ps' Ex. 16: Borcher Report (1993).)

2. The minimum level of funding per student or (Base Revenue Control Limit (BRCL)) derives from a 1979-80 cost study which determined the amount of money being spent per student at that time. Transportation costs (Transportation Revenue Control Limit (TRCL)) are added to the BRCL to derive the revenue control limit (RCL) for each district, and then there are add-ons for capital outlay. There are two different funds for capital outlay. One is the Capital Outlay Revenue Limit (CORL) which may be spent on capital expenditures or shifted to maintenance and operations. The other is the Capital Levy Revenue Limit (CLRL) which is exclusively for capital improvements. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

3. Each district has a Revenue Control Limit (RCL), which is the sum of the BRCL and the TRCL

(transportation funding, *see* ¶ 4). These funds and any CORL funds (capital outlay funding, *see* ¶ 4) which the district has shifted to operations make up the State guaranteed amount of operational funding for a school district. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) Recent legislative changes to the State financing scheme, known as Students FIRST, provides more money for maintenance of buildings and additional technology and instructional materials. Funding increases from Students FIRST are largely capital in nature and NUSD did not experience any increase in its operational funding. (Day 1, TR at 31-34.)

4. The State's financing scheme is basically a foundation program, which means that the State guarantees a minimum level of funding for each student to ensure that each student receives a basic education.

5. The base level amount in 1992-1993 was $2,410.26 per student. (Day 1, TR at 35); (Ps' Ex. 16: Borcher Report (1993) at 6.) The legislature has increased the base level amount on an average of nine-tenths of a percent a year. (Day 1, TR at 35-36.) The inflation rate during the eight years has been an average of 2.8 % a year, or toughly three times more than funding increases by the State. (Day 1, TR at 35-36.) The current base level amount is approximately $3,174.11. (Day 1, TR at 17.)

6. Beginning in 1991-1992, the State legislature stopped funding the full inflation rate. In 1991-1992, the inflation rate was 4.1 %, but the State only gave

an increase to the base support level of 1 %. (Day 1, TR at 29.)

7. In 1999-2000, the legislature increased the basic aid equal to the gross national product (GNP) which was 1.1 %, but because of population increases, the money went towards new student expenses rather than for increased aid per student. (Day 1, TR at 30.)

8. The State's finance formula increases the base amount by weighing certain factors such as type of student, experience of teaching faculty, size and type of school district, to derive the Base Revenue Control Limit (BRCL). (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) The amount of money school districts, such as NUSD, receive for maintenance and operations depends on the number of students in the district multiplied by the base levels set by the State.

9. The weighing factor for LEP was put in place in 1989-90 by the State legislature and is based on a cost study performed in 1987-88, which showed that on the average school districts were spending $450 per LEP student. (Ps Ex. 31: Review of Resources and Costs Associated with Services for LEP Students in Arizona by Arias and Shupp, March 12, 1998, at 23; *see also* Day 3. TR at 78; Romero testimony (LEP Cost Study of 1987-88 estimated an average total cost of $424 per student for LAU programs based on the amount of actual dollars the various districts were reportedly spending in 1987-1988 towards their respective programs.))

Appendix D

10. Ralph D. Romero, Director of Operations of the Division of Academic Support, previously Director of Academic Support, testified as to the possible deficiencies and problems with the LEP Cost Study prepared by the Department of Education in 1987-1988. (Day 3, TR at 66.) The cost study is not reflective of the actual cost of operating a successful LAU program for the following reasons: 1) the cost figures reported by the districts may not have been final audit figures and could have been subject to change. (Day 3, TR at 67); 2) there may have not been uniformity in data collection, meaning that the districts may have differed in the way they categorized various program costs (for example, districts could have employees performing the same functions, i.e., administrative tasks, but categorized them differently, i.e., as teachers instead of as administrative staff) (Day 3, TR at 69); 3) the cost figure was deter mined [sic] by adding the year-to-date cost to an estimated cost for the program to the end of the fiscal year, (Day 3, TR at 71); 4) the cost of providing LEP students that are more proficient in the English language will be less than running a program in a district like NUSD where there are large concentrations of very limited English proficient students, (Day 3, TR at 72-73); 5) the districts operate many different types of LAU programs, including: English as a Second Language (ESL), bilingual transitional, and bilingual-bicultural, (Day 3, TR at 73); 6) some district LAU programs cost a lot per student and some cost very little, which suggests that the programs are very different. (Day 3, TR at 74); 7) there was no

assessment made between the cost of a program and the quality of the program; and 8) certain conditions were not considered that may contribute additional significant costs. (Day 3, TR at 78).

11. The State has never updated nor revised the 1987-1988 LAU cost study. The State has not conducted a more accurate assessment of LAU program costs. The State legislature has ordered another cost study to be done this year. (Day 3, TR at 81.) The legislature created the English as a Second Language (ESL) and Bilingual Education Study Committee to conduct the cost study as follows: 1) determine the cost of educating LEP students versus what is currently being spent; 2) try to determine the best practices in bilingual education and ESL; 3) look at ways to improve bilingual education in the school districts across the state, and 4) determine if programs are in compliance with state and federal mandates. (Day 3, TR at 81.)

12. In 1989-90, the LEP weight was .02, which meant that schools received approximately $50 more for each LEP student. In 1991-1992, the State legislature increased the weight to its current amount, .060, which results in approximately $150 being apportioned for each LEP student, (Day 1, TR at 25), and results in an increased BRCL for each LEP student A.R.S. § 15-943. For example, if the base level per student is $2,410.26, NUSD would receive an additional $144.62 for each LEP student. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) The State provides school districts with funding in the form of block grants. There are no

limitations or restrictions placed on the funding so a district may use the money as it sees fit. (Day 1, TR at 9, 13.) For example, a district may spend only $50.00 per LEP student on LAU programs, instead of the $150.00 allocated by the State, or it may exceed the State's minimum and spend more per LEP student. (Day 1, TR at 13.)

13. The State financing scheme provides for a portion of the school revenues to be raised at the district and county level. The State contributes the remainder. The local share is determined by the relative wealth of the district, as measured by assessed valuation per student, and then the State makes up the difference. (Ps' Ex. 16: Borcher Report (1993).) The tax rate is specified by the State legislature, (Qualifying Tax Rate) (QTR), which for a unified school district, like NUSD, is $4.40 per $100 of assessed property valuation (AV) in the school district. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

14. NUSD determines its financial responsibility as follows: 1) NUSD assessed valuation of $90,992.662 [sic] for 1998; 2) NUSD has 5,889 students; 3) assessed valuation per student (A-V per student) is determined by dividing the assessed valuation for NUSD by the number of students in NUSD ($90,992,662 / 5,889 = $15,451.29 A-V per student); 4) NUSD's contribution per student is calculated by multiplying the A-V per

student by the QTR for NUSD (($15,451.29 / 100)[3] X $4.40 = $679.86 per student); 5) the State's contribution per student is calculated by subtracting NUSD's contribution per student from the base support level, which is currently $3,174.11 per student ($3,174.11-$679.86 = $2,494.25). Total contributions are calculated by multiplying the respective per student contributions by the number of students (($2,494.25 X 5,889 = $14,688,638.00 in state funding) ($679.86 X 5.889 = $4,003,695.50 in local funds)). (These figures are examples only and do not reflect the exact per student allocation which would be adjusted by the weighting factors, pursuant A.R.S. § 15-943.) (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

15. Above and beyond the State guaranteed minimum, School districts can increase their operational budgets by up to 10 % more than the RCL, by voter approved spending changes known as "overrides." (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

16. A high-valuation district can generate override money with little additional tax burden to its residents as compared to low-valuation districts. For example, NUSD can raise $1,600,000.00 in an override, based on their assessed valuation of $90,992,662.00, by imposing a tax of $1.83 on every $100 of assessed value; whereas, Catalina Foothills Unified School District which is a high-valuation

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[3] QTR = $4.40 per $100 of assessed value.

district, can raise the $1,600,000.00 by imposing a tax of $.56 on every $100 of its $285,270,808.00 assessed valuation. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

17. The impact of financing LAU programs via an override is greater in low-valuation districts because they have heavier concentrations of LEP students as compared to high-valuation districts. For example, based on 1998 figures, NUSD could increase LEP funding by $350.00 per student, by passing an override for $1.83 per $100 of assessed value to raise $1,662,500.00 because it has 4,750 LEP students; whereas, Catalina Foothills Unified School District could increase its funding by $350.00 per student, by passing an override for a $.07 to raise $21,000.00 because it only has 60 LEP students. (Day 1, TR at 27-28.)

18. Dr. Sidney D. Borcher's Report sampled 18 districts. He found that twice as many high assessed valuation districts (12) have passed overrides as compared to low assessed valuation districts (6), (Ps' Ex. 16: Borcher Report (1993) at 24, 25: Table 13), and that only high assessed valuation districts had overrides generating funding to the maximum limit. (Ps' Ex. 16: Borcher Report (1993) at 19, 25 Table 13.) Dr. Borcher testified that lower wealth districts have a hard time passing an override because they already have a very high tax rate, and even though the constituency maybe sees the need for better education, they just say we can't afford it. (Day 1, TR. at 47.)

19. NUSD does not have an override. (Day 1, TR at 26.)

20. Without a voter approved override, NUSD can only increase LEP funding by shifting money from non-LEP student apportionments. For example, funding NUSD's LEP program at $450 per LEP student results in a loss of $270.00 to each regular student, (Day 1, TR at 37), from the regular program's operating budget. The shifting of funds to LEP programs, therefore, impacts all students because it results in a lower base level of financial support for all students, including LEP students. (Day 1, TR at 38). This is typical for a low assessed valuation district where on the average it will take approximately $112.00 to generate $450 per LEP student; whereas, a high assessed value district could accomplish the same level of funding with only a $13.00 loss per student. (Ps' Ex. 16: Borcher Report (1993) at 32; Table 18.)

21. Low-valuation districts also have heavier concentrations of "at risk" students than high-valuation districts. An "at-risk" student is a student who usually has some socioeconomic type of impact that would cause them to be "at risk" of not learning. (Day 1, TR at 38-39.) The most common accepted measurement in education for determining "at risk" students is the number of students that qualify for free or reduced lunches, which is primarily an economic measurement. (Day 1, TR at 39.) The State does not provide funding for "at risk" students. (Day 1, TR at 39.) "At risk" student programs are not included in the list of special needs weighted for

additional funds by the State. A.R.S. § 15-94-43. Federal programs, primarily through Title 1, provide funding for "at risk" students and this funding makes up approximately 4 % of the State's total budget for Arizona schools. (Day 1, TR at 36, Day 1. TR at 40; BR at 3.)

22. Districts with high enrollments of LEP students also tend to have a high percentage of reduced lunch programs. (Ps' Ex. 16: Borcher Report (1993) at 31: Table 17). This is not always true. (Day 1, TR at 45.) For example, inner-city schools have "at risk" students who speak only English and receive free and reduced lunches. (Day 1, TR at 45.) Responding to questioning by the State's attorney, Dr. Borcher testified that the correlation exists in NUSD, where LEP students are the same students that make up the bulk of the "at risk" student population enrolled in the free-lunch programs, because these students come from non-English speaking immigrant families from Mexico whose parents have low paying jobs. (Day 1, TR at 43-44.)

23. Ann Elizabeth Doan, Director of Bilingual Education and Curriculum for NUSD, testified that in 1992, the Office for Civil Rights conducted a LAU compliance review which resulted in a lengthy report on the status of NUSD's LAU programs and a LAU compliance agreement (OCR Compliance Agreement) to remedy the following problems: 1) clean up the process of identifying LEP students so that state accepted measures were being used; 2) place the student in a LAU program, when the child was identified as a LEP student; 3) the LAU program

could be bilingual education. [sic] English as a Second Language (ESL), or an individual education program (IEP); if the LEP student was a special education student, LAU provisions had to be included in the student's special education LEP; 4) monitor LAU program to ensure program sufficiency and to show that the program actually improves the student's academic level and English skills; 5) review LAU program exiting process; and 6) follow up exited LEP students to insure that students continue to work at grade level. (Day 2, TR at 7-8.)

24. A key element to implementing the OCR Compliance Agreement required NUSD to secure qualified LEP teachers. (Day 2, TR at 7-8.)

25. Teachers are qualified LEP instructors if they have a bilingual endorsement. This endorsement requires a teacher to know Spanish. To teach in a bilingual classroom, the teacher must pass a test at a state university which shows they have an academic level of Spanish. (Day 2, TR at 23.)

26. Teachers are qualified LEP instructors if they are ESL endorsed. The teacher does not particularly have to know Spanish, but at some point in time should have learned a second language, such as French, German, etc., so that the teacher knows the process that children go through to learn a second language. (Day 2, TR at 23.)

27. NUSD has adopted a bilingual education program and an ESL program. (Day 2, TR at 10.) The goal of NUSD's bilingual program is for students to graduate from highschool proficient in both

English and Spanish, meaning able to read, write and speak both English and Spanish. (Day 2, TR at 10.) The goal of the ESL program is to teach enough English so that the student can be mainstreamed into a grade level classroom and function in English with additional support, so that the student maintains his or her grade level in content area skills. (Day 2, TR at 17.)

28. The State provides that the decision regarding which type of LAU program to implement is made by the school, so some schools in NUSD have adopted bilingual programs, and others use ESL programs. (Day 2, TR at 25.)

29. NUSD has six elementary schools, two middle schools, one highschool, and an alternative highschool. (Day 2, TR at 9.) The student population of approximately 5,889 students is approximately 95 % Hispanic. (Day 2, TR at 15.) Approximately, 60 % of the student body is LEP and 63 % receive free and reduced lunches. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.)

30. There are approximately 2,500 to 2,800 students enrolled in NUSD elementary schools. Approximately, 80 % of the elementary students are classified as LEP, and approximately 95 % of LEP students are from Mexican-American homes. (Day 2, TR at 9, TR at 15.)

31. NUSD elementary schools use a transitional bilingual education model. Students which mainly speak Spanish are placed in classrooms where they're taught to read and do math in Spanish while

they're learning English. There are special classes in kindergarten through 6th grade to teach English. As soon as a student has command of oral English, he or she is put in an all English program, (Day 2, TR at 10), even though the child may not be academically literate in English. In other words, a student is still LEP because he or she cannot read or write proficiently in English, but once oral skills are acquired the student is mainstreamed.

32. Ideally, all LEP students not in ESL classes are supposed to be taught in the mainstream classrooms by LEP endorsed teachers, with half the teachers being bilingual and the other half being ESL endorsed. Between 500 to 1,000 of the 2,700 elementary students are not with endorsed teachers, so the schools do a lot of student-teacher exchanging to enable students to be with an endorsed teacher at least for some part of each day. (Day 2, TR at 11.)

33. The typical total enrollment in a primary classroom to which LEP students are assigned ranges from 20 students, which is good, to 30 students in a classroom. NUSD cannot reduce LEP class sizes because there are not enough classrooms and there are not enough teachers. (Day 2, TR at 12-13.) To adequately implement the transitional bilingual education program at the elementary level, NUSD needs at least 60 more teachers with either bilingual or ESL endorsements. (Day 2, TR at 14.) .

34. There are approximately 1,500 students enrolled in NUSD middle schools. Approximately, 70 % of the middle school students are classified as LEP, and approximately 95 % of the LEP students

are from Mexican-American homes. (Day 2, TR at 15.)

35. NUSD middle schools use an ESL model. (Day 2, TR at 15.) The program focuses on "newcomers," meaning students who have recently immigrated from Mexico. (Day 2, TR at 16.) There are approximately 100 "newcomer" students. These students are placed in self-contained ESL classrooms most of the day to learn English. At the same time, they're assigned to social studies, science, and math teachers that have some training in sheltered English instruction to learn the content areas and at the same time develop English language skills. (Day 2, TR at 16); (Day 2, TR at 30.) There are also LEP students who have been in the district one to four years, but NUSD does not have enough qualified teachers to provide all LEP students with LAU instruction. Therefore, it focuses on teaching the "newcomers" English. (Day 2, TR at 19.)

36. The majority of LEP students in NUSD middle schools are *not* in ESL programs, but are mainstreamed because the State allows students who can communicate orally in English to be placed in mainstream, English only classrooms. These students are LEP because they are not English literate; they do not read nor write at or near grade level. They could be one, two, three, even four or five years behind their peers, but according to the State they don't belong in an ESL classroom. (Day 2, TR at 17.)

37. If mainstreamed, these LEP students require English language support in their

mainstream classroom. The mainstream classroom teachers should be language endorsed so that they are trained in different strategies, such as sheltered English and cooperative learning, to provide language support for the students who are learning content area skills. (Day 2, TR at 18.) Mainstreamed LEP students in NUSD middle schools do not receive any English language development instruction in the course of a given school day. (Day 2, TR at 20.)

38. To comply with State regulations, NUSD does a lot of student-teacher exchanging so that at some part of the day the LEP students will have a teacher with a language endorsement, who can provide additional support. "Additional Support," however, is not defined. It doesn't mean specifically English language development. If a student is slipping academically, there should be knowledge that the student is LEP, and the teacher should provide either extra tutoring or adapt the instruction for that student. NUSD doesn't know whether this actually happens, but it could happen during the one period per day that the student is with the endorsed teacher. (Day 2, TR at 20-22.)

39. NUSD has approximately 300 middle school teachers. Only 140 are language endorsed; 160 have no endorsement. Over half of NUSD's teachers are not qualified to work with NUSD's LEP students. (Day 2, TR at 32.) To actually implement the ESL program in its middle schools, NUSD needs approximately 160 more LEP endorsed teachers,

with approximately half being bilingual and half being ESL endorsed. (Day 2, TR at 22.)[4]

40. There are approximately 1,800 students enrolled in the highschool. Approximately, 65-70 % of the students are LEP, (Day 2, TR at 41-42), and approximately 95 % of the LEP students are from Mexican-American families. (Day 2, TR at 15.)

41. There are approximately 130 students enrolled in the alternative highschool. Approximately, 98 % of these students are LEP. (Day 2, TR at 41.)

42. The highschool uses an ESL model. New students that have been in the United States one to three years are placed in self-contained ESL classrooms where they learn English. "Newcomers," usually from Mexico, are generally advanced in math and science, so NUSD attempts to have qualified bilingual math and science teachers to teach grade level content area skills, while the students learn English (Day 2, TR at 42.) LEP students, new or otherwise, who have oral English skills are put into mainstream classrooms, even if they do not have English reading or writing abilities. (Day 2, TR at 43.) These students should be in classrooms with LAU endorsed teachers, (Day 2, TR at 44); (Day 2, TR at 49-50), but they are not, -there [sic] is no attempt to provide English language development

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[4] On cross-examination, Ms. Doan testified that the 160 included the 60 teachers needed at the elementary level. (Day 2, TR at 103.)

instruction for these LEP students during a typical school day. (Day 2, TR at 45.)

43. LEP students that are not proficient in reading or writing English should be enrolled in what NUSD calls LEP English, or English B, to give them additional support in English language development. (Day 2, TR at 46.) Most of the non-newcomer LEP students at the highschool are, however, in mainstream English classes because there are not enough English B classes. To increase the English B classes, NUSD needs smaller class sizes, more classrooms, additional materials that are adapted to students learning the English language, and qualified teachers. NUSD's mainstream English teachers need to be trained to work with second language populations and help students develop their English literacy skills, not just their highschool English skills. (Day 2, TR at 47.)

44. Generally, only "newcomer" LEP students can enroll in bilingual math classes, but non-"newcomer" LEP students, having only oral English skills, should also be enrolled in these classes. NUSD students do very poorly on normed reference national tests in math because the tests are very content specific, meaning they contain a lot of vocabulary and a lot of grade level reading. If a student is not literate in English, meaning they are not proficient at reading and writing English, they will need a lot of support through their math classes to pass the English-only math tests. (Day 2, TR at 48.)

45. NUSD's bilingual math class and science class are designed to impart content skills, not to

develop English language skills. (Day 2, TR at 52-53.) There is no bilingual social studies class, but NUSD has social studies teachers with bilingual endorsements whom adapt their teaching to the needs of LEP students. (Day 2, TR at 53.) NUSD utilizes emergency teaching certificates to employ non-English speaking teachers to teach LEP students in the various content areas. These teachers are not tested to determine whether they are proficient in speaking, reading, and writing English. (Day 2, TR at 52.) These teachers teach in classes designed to make content areas understandable to LEP students. The classes are not designed to develop the students' English language skills. (Day 2, TR at 52-53.)

46. LEP students who have been exited from the LAU program are reassessed every two years. If the student scores at the 35th percentile or below on the English reading test, he or she should be placed in a class with a language endorsed teacher, but this is not possible in NUSD because of the teacher shortages at every grade level in NUSD. Instead, NUSD notifies the teacher that the student needs additional support, and the teacher is asked to help. If the student is in a classroom with an untrained teacher, he or she will probably not get any help. (Day 2, TR at 79.)

47. There are teachers available in the labor market to hire, but NUSD does not have enough money to hire the number of teachers it needs. NUSD's current salary level is not competitive

enough to keep endorsed teachers or to hire new endorsed teachers. (Day 2, TR at 33.)

48. Since entering into the OCR Compliance Agreement, staffing at NUSD has gotten worse. NUSD loses approximately 5 to 15 language endorsed teachers per year. Since the OCR Agreement, NUSD has lost approximately 40-60 language endorsed teachers, approximately 25 of these teachers taught at the elementary level. (Day 2, TR at 33-34.)

49. As part of the OCR Agreement, NUSD adopted a policy that all newly hired teachers be language certified or agree to obtain the endorsement within three years of their being employed by NUSD. (Day 2, TR at 36-37.) NUSD dropped the requirement because it was too burdensome, (Day 2, TR at 37), even though NUSD paid the cost of certification classes up front, and allowed the teacher to repay the district after he or she acquired provisional bilingual endorsement and received an $800.00 addendum from the district for having obtained the certification. (Day 2, TR at 37.) NUSD dropped the $800.00 addendum program when it dropped its requirement that newly hired teachers become language endorsed. (Day 2, TR at 38.)

50. NUSD offers a $2,000 stipend per year for language endorsed teachers, but this primarily operates to attract new teachers because even with the stipend, language endorsed teachers can make more money in other districts. (Day 2, TR at 35.) Other school districts with higher salary ranges

actively recruit NUSD's language endorsed teachers. (Day 2, TR at 35.) NUSD has a beginning salary schedule competitive with other school districts, but as time goes on, the increases for teachers that work for NUSD do not keep pace with increases available in other school districts, so NUSD may be able to attract teachers at the onset, but can't keep them. (Day 2, TR at 108.)

51. NUSD arranged with Northern Arizona University, Nogales satellite campus, to offer the six or seven courses required for bilingual and ESL endorsements. (Day 2, TR at 39-40.) The University of Arizona does not have a satellite program for teachers wishing to be certified by the U of A, and it is impractical to drive to Tucson after the school day is over to attend afternoon classes at the university. (Day 2, TR at 38.) NUSD contracts with Cal. State Fullerton to train its teachers on how to develop academic English and academic competence across the curriculum, the development of literacy in content areas, and the development of proper assessments for language minority students. The Cal. State Fullerton program does not provide language endorsements for NUSD's teachers, but it does give them the type of training they need to work with LEP students. (Day 2, TR at 57.)

52. The State has never provided NUSD with any form of assistance designed to increase the number of newly hired teachers having language endorsements, nor provided any form of assistance designed to increase the number of current faculty who obtain language endorsements. Instead, the

State tells other districts no look to NUSD for trained and qualified teachers. (Day 2, TR at 15.) Except for the State's base level funding for NUSD (Group B funds), the State does not provide any assistance regarding implementation or operation of NUSD's LAU program. Specifically, the State does not provide money, training programs or materials, or technical assistance. (Day 2, TR at 40-41, 53, 54, 58.)

53. Other LAU program inadequacies, besides qualified faculty, are as follows: 1) NUSD needs additional classroom space to reduce class size; 2) NUSD needs materials for both language groups; 3) NUSD needs to train its teachers to work with the LAU Program materials; 4) NUSD needs ESL materials, especially to teach language skills in content areas, such as English, social studies, science, and math; 5) NUSD needs to train its teachers to implement a special math program; 6) NUSD needs to train parents to help their children in the classroom; 7) NUSD needs to pay extra for its teachers to work after school hours with parents and students, and 8) NUSD must also provide transportation for after school tutoring and parent training programs. (Day 2, TR at 59-61.)

54. Ms. Doan testified that NUSD spends more on its LAU programs than the amount of Group B money provided by State. (Day 2, TR at 64.) To acquire funding for the LAU program, NUSD robs from Peter to pay Paul. (Day 2, TR at 62.)

55. Ms. Doan has a budget of $16,000 to implement necessary upgrades to NUSD's LAU

programs. (Day 2, TR at 63.) She prepared a budget totaling $500,000 to $700,000 to upgrade the LAU program to include the following: 1) NUSD would cover the cost for its teachers to acquire language endorsements; 2) NUSD would pay teachers to tutor students after school; 3) NUSD would hire outside people to tutor students; 4) NUSD would purchase LAU program materials, including testing materials to use to assess students; 5) NUSD would provide teacher training on the use of the LAU materials; and 6) NUSD would hire employees to conduct the testing, including the initial LEP assessment, reassessment, and the follow-up. (Day 2, TR at 62-63.)

56. NUSD receives the following federal grant money for LAU programs: 1) Nogales Highschool, last year of Title 7-five-year grant, which provides LEP students with language support to work at grade level; 2) Wade Carpenter Middle Academy of Technology, last year of Title 7-five-year grant, which provides $250,000 per year to the highschool and $300,000 a year to the middle school for staff training and to get teachers language endorsed; 3) Wade Carpenter Middle School, first year of Title 7-two-year grant, which provides $125,000 per year to develop inner session programs for LEP students; 4) the alternative highschool has an academic and technology grant; 5) Lincoln Elementary, last year of Title 7-five-year grant which provides $310,000 per year for computers, teacher training and language endorsements. The federal government contracts directly with the individual schools for these grant programs. The schools must use the money as

stipulated in the grant, and the district cannot use the money to supplement the regular LAU budget. (Day 2, TR at 65-69.)

57. The goal of all the federal grants is, number one, to develop the English skills of the student, and number two, to develop the academic skills of the students. At the end of this school year, NUSD will lose three of the federal LAU grants for a total dollar loss of between $800,000.00 and $1,000,000.00. (Day 2, TR at 69.) The consequences of these grants ending will be significant because the federal money has supported the acquisition of language endorsements for NUSD teachers and training for teachers that do not have endorsements. (Day 2, TR at 70.)

58. Securing new federal grants for LAU programs is unlikely because they are highly competitive. (Day 2, TR at 71.) Only about 10 % of federal grant proposals across the country are funded. (Day 2, TR at 72.) There are no state funds to replace the federal grants which are ending this year. (Day 2, TR at 71.)

59. NUSD finances its "at risk" programs through Title 1. (Day 1, TR at 38.) All NUSD schools qualify for Title 1 funds for "at risk" students. In districts like NUSD, which are below the poverty level, Title 1 funds must be used for school-wide improvements rather than targeted on "at risk" students. (Day 2, TR at 88); (Day 2, TR at 93-94, 96.) NUSD has school-wide Title 1 programs at all levels: elementary, middle school, and highschool. (Day 2, TR at 90-91.) At the elementary school level. [sic]

Appendix D

Title 1 funds provide for all day kindergarten which enables the students to acquire academic skills at a faster pace; at the middle school level, the money goes to fund parent involvement programs, math and reading programs (Day 2, TR at 94); and the highschool spends money on parental involvement programs, tutoring for students, computer labs, and extended day classes (Day 2, TR at 95).

60. There is a direct correlation between the LEP student population and "at risk" students in NUSD. The State and NUSD have developed measurements for assessing the success of Title 1 programs. AIMS is one measurement the state uses to determine success, and it also uses an independent testing company to administer a normed reference test. (Day 2, TR at 96.) NUSD has had a transitional district assessment plan in place since 1994 to test reading, writing, and speaking in English and Spanish. The tests show that the Title 1 programs for "at risk" students are succeeding slowly. (Day 2, TR at 97.) NUSD students are below grade level, so its not enough to make one year's progress in one year, the students must make more than one year's progress in one year to ever catch up. NUSD students have not been able to do that despite Title 1 efforts. (Day 2, TR at 97.)

61. The Court finds that because of the overlap between NUSD's LEP students and "at risk" students, the Title 1 "success" assessments are most likely reflective of NUSD's LAU program's success or lack thereof.

Appendix D

62. The OCR has not sent anybody to monitor NUSD regarding the success of its LAU programs since institution of the 1992 OCR Agreement. (Day 2, TR at 81.) The last State monitoring visit at NUSD was in 1993. (Day 2, TR at 83.) Prior to that, the State monitored NUSD in 1991. The OCR visit and the State's visit in 1991 resulted in significant improvements to NUSD's LAU program. (Day 2, TR at 83.)

63. The State implemented an active monitoring program in 98-99. The first spring semester of the academic year 1998-1999, the State monitored five school districts and is continuing the monitoring this semester so that approximately one district a month is monitored. The State believes that with year round school, it can continue monitoring during the summer. There are 460 districts. The State conducts on-site monitoring which takes about three days and follow-up monitoring which is approximately two days. The State has sent a monitoring guide to each district to explain state compliance mandates. (Day 3, TR at 82-83.) The State has not yet monitored NUSD.

64. Plaintiff's expert Dr. Gene Glass testified that minority students fail standardized tests such as AIMS and Sanford 9 in dramatically larger proportions than anglo students. He based his opinions on data compiled for Phoenix Union Highschool District (PUSD), which is not at all similar to NUSD and, therefore, does not provide a meaningful comparison. While both schools have similarly high indices for "at risk" students, (Day 2,

TR at 25), (Day 2, TR at 42), the two schools are however, entirely different. PUSD is a large urban school in a high assessed valuation district. PUSD has a racially diverse student body which is comprised of Anglo, Black and Hispanic students. NUSD is a low assessed valuation district. NUSD's student body is 95 % Mexican-American, and only 1 % of the students are Black. (Day 2, TR at 108.) NUSD has 63 % of its student body in its free and reduced lunch program, and a corresponding LEP population of 60-70 %. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.) PUSD has approximately 40 % of its student body in the free and reduced lunch program, but only has a LEP population of 7 %. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.) Plaintiffs' expert failed to consider these demographic differences and concluded that they were irrelevant. This approach made his testimony of little use to the Court for the purpose of establishing whether minority students fail standardized tests because of their race, national origin, limited English proficiency, because they attend schools in low valuation districts, for some other socio-economic reason, or for some combination of all these factors.

CONCLUSIONS OF LAW

To the extent any of the Findings of Fact contain or include any Conclusions of Law, said Findings of Fact are incorporated herein by reference. Furthermore, this Court provided a detailed discussion of the applicable law in its prior Order of April 14, 1999, which is incorporated herein by reference.

Appendix D

A. LAU Resource Issue

1. The Court's inquiry is three-fold:

The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.

The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform theory into reality.

...If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned....

(*See* Order filed April 14, 1999 at 15-16 (citing *Castaneda v. Pickard*, 648 F.2d 989, 1009-1010) (5th Cir.1981)).

2. Local school boards are responsible for the operation of schools, but they must comply with controls over financing and spending prescribed by the Arizona legislature. (Ps.' Ex. 16: Borcher Report (1993).)

3. The parties agree that the State of Arizona has prescribed, and NUSD has adopted, models that are generally regarded by experts as sound designs for effective LAU instruction. The State's system passes the first test under *Castaneda* in this regard.

4. For the State to adopt appropriate practices and allocate adequate resources, it must first establish minimum standards for providing LAU funding and program oversight. (*See* Order filed April 14, 1999 at 14 (citing *Roosevelt II,* 190 Ariz. 520, 950 P.2d 1141, 1145 (1997) (performing an equal protection analysis, the *Roosevelt* Court held that it could only determine the adequacy of the State's program once a minimum standard had been set))).[5]

5. The State has established minimum academic standards, which are promulgated as the revised Arizona Essential Skills (AES). The State developed

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[5] *Roosevelt Elementary School District No. 66 et al. v. C. Diane Bishop,* (*Roosevelt I*) 179 Ariz. 233, 877 P.2d 806 (1994) (en banc), *appeal after remand. Hull v. Albrecht,* (*Roosevelt II*) 190 Ariz. 520, 950 P.2d 1141 (1997), *appeal after remand* (*Roosevelt III*) 192 Ariz. 34, 960 P.2d 634 (1998) (equal protection analysis applied to claim that Arizona's school financing scheme violated the General and Uniform Clause of the Arizona Constitution).

a corresponding test for measuring attainment of the skills, which is the Arizona Instrument to Measure Skills (AIMS). The Arizona Essential Skills are the minimum standards which must be taught in all schools and which all students, including LEP students, must master.

6. The State has established a "minimum" base level amount for the LAU program of approximately $ 150.00 per LEP student, pursuant to the State's weighting of 0.060 under A.R.S. § 15-943. Since 1991-1992, the State legislature has failed to account for inflation in its base level allocation for LEP students. The State's LAU program funding formula was derived from, but is less than the 1987-1988 estimate that an average LAU program costs at least $ 450.00 per LEP student. The State admits that the LAU program costs in the 1987-1988 study are unreliable, but the State has failed to update its 1987-1988 cost study, nor has the State conducted any other studies to more accurately determine the actual cost per student for LAU instruction. The Court finds that the $450 estimated LAU program cost, on which the State's minimum $150 appropriation is based, is arbitrary and capricious.

7. The State's minimum $150 appropriation per LEP student, in combination with its property based financing scheme, is inadequate and has resulted in the following LAU program deficiencies: 1) too many students in a class room, 2) not enough class rooms, 3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, 4) not enough teacher aids, 5) an

inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses.

8. The State does not provide any other forms of in-kind assistance to offset the base level deficiency. The State has not designed any programs, nor implemented any practices, nor committed any resources which would supplement or supplant district level services. The State has not assisted NUSD in any way in increasing LAU endorsed teachers. Since 1992, the State has not provided any LAU monitoring or oversight to assist NUSD in improving its LAU program.

9. The State's minimum base level for funding LAU programs is arbitrary and capricious and bears no relation to the actual funding needed to ensure that LEP students in NUSD are achieving mastery of its specified "essential skills." *See* (Order filed April 14, 1999 at 14-15 (citing *Roosevelt II,* 950 P.2d at 1145 (dollar amount chosen by legislature is arbitrary and capricious because it bears no relation to actual need))). The State is currently conducting a study to more accurately assess LAU Program costs which might well provide a basis for the State to set a minimum base funding level per LEP student which would not be arbitrary and capricious.

10. Defendants are violating the EEOA because the State's arbitrary and capricious LAU appropriation is not reasonably calculated to effectively implement the LAU educational theory which it approved, and NUSD adopted.

11. Defendants are violating the EEOA because the State has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized LAU program in NUSD, the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

B. Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 2000d

1. Plaintiffs allege a violation of Title VI's implementing regulations which prohibit any recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2). Under Title VI's implementing regulations, proof of discriminatory intent is not a prerequisite to a private cause of action against governmental recipients of federal funds. Proof of discriminatory effect suffices to establish liability under the regulations. (*See* Order filed April 14, 1999 at 17 (citing *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-82 (1984) (en banc), *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-987, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).))

2. To establish a prima facie case of disparate impact, Plaintiffs must establish that the AIMS test will have a distinctly disproportionate and adverse

impact on minority students in NUSD; the AIMS graduation test causes the disparity, and that the disparity falls on Plaintiffs because they are members of a protected group. Plaintiffs rely solely on the evidence presented by its expert witness, Dr. Glass, who testified that minority students in PUSD disproportionately fail standardized tests, like the AIMS test, when compared to Anglo-students. The Court rejects this evidence as not being a relevant comparison for students in NUSD. Specifically, the evidence fails to establish the necessary causal link between the disparate impact of the tests and the Plaintiffs' minority status. The correlation that exists in NUSD between "at risk" students and LEP students destroys any race-based inferences that might otherwise be drawn. Based on the evidence presented at trial, the students at NUSD might very well fail the tests because they are low-income "at risk" students. Members in this group are not protected from discriminatory treatment. *See* Order filed April 14, 1999 at 19-20 (relying on *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir.1990) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 985-988, 108 S.Ct. 2777) (to prove causation, plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group)). Plaintiffs fail to establish a prima facie case of disparate impact.

Accordingly,

IT IS ORDERED that the Court finds in favor of Plaintiffs on Count One of the Second Amended Complaint that Defendants are violating the EEOA, (20 U.S.C. § 1703(f)), and against Plaintiffs on the Title VI claim, (34 C.F.R. Part 100), (42 U.S.C. § 2000d), challenging the AIMS test.

IT IS FURTHER ORDERED that no further issues having been brought before this Court for disposition, the Clerk of the Court shall enter judgment accordingly.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of MIRIAM FLORES, a minor child et al., Plaintiffs,	JUDGMENT IN A CIVIL CASE
vs.	
STATE OF ARIZONA, et al., Defendant.	Case No. CIV-92-596-T-ACM

X **DECISION BY COURT.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court finds in favor of Plaintiffs on Count One of the Second Amended Complaint that Defendants are violating EEOA, 20 U.S.C. 1703(f)), and against Plaintiffs on Title VI claim, (34 C.F.R. Part 100), (42 U.S.C. 2000d), challenging the AIMS TEST

October 27, 1998
Date

[Stamped: Filed on
January 24, 2000]

RICHARD H. WEARE
CLERK

/s/
(By) Renee Ludeke,
Deputy Clerk

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, a minor child, et al.,	)	No. CV92-596-TUC-RCC
	)	**ORDER "WO"**
Plaintiffs,	)	
vs.	)	
STATE OF ARIZONA, et al.,	)	
Defendants.	)	

On October 31, 2005, the Court took under advisement a request made by Plaintiffs for sanctions due to the State of Arizona's failure to take action to comply with the Court Order (Docket No. 296), that found that English Language Learners ("ELL") programs must be funded in a manner that is not arbitrary and capricious. Also, the court took under advisement the following motions: Defendant's Opposition to Motion for Sanctions and Request for Accelerated Determination Re: Consideration of Federal Funds (Docket No. 303), and the Opposition of ACEC and AGC to Plaintiffs' Motion for Sanctions (Docket No. 300).

The Court was also asked to preclude the State from requiring ELL students to pass the Arizona's Instrument to Measure Standards ("AIMS") test as a necessary criteria to receive a diploma and graduate from high school until the State has properly funded

ELL programs for a sufficient period of time to provide ELL students with a meaningful opportunity to achieve the State's academic standards that are measured by the AIMS test.

Defendants have asked the Court for an advisory opinion to decide the status of federal funds in relation to the determination regarding the adequacy of ELL funding. Plaintiffs have asked the Court for attorney's fees for their continued efforts in trying to get the State to comply with its legal obligations to fund ELL programs properly.

The Court has reviewed this case from its inception which was 1992. Thousands of children who have now been impacted by the State's continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case. After extensive lawyering on both sides, the case finally resulted in Judge Marquez deciding in February 2000, that the method used by the State for funding ELL programs bore no rational relationship to the actual cost of providing such programs and was inadequately funded in an arbitrary and capricious manner that was violative of the Equal Education Opportunity Act ("EEOA") of 1974.

The legislature in the first instance decided after some prodding by both the Plaintiff and the Court, that they would do a cost study for determining the amounts necessary to achieve this purpose. In December of 2001, the legislature passed House Bill ("HB") 2010. This bill was to be an interim measure that would allow for the study to be completed and for the legislature to have time to

pass the necessary legislation to comply with the Court's order. Ultimately, with the Court's consent, the legislature gave itself nearly three years to accomplish this process. In January 2005, Plaintiffs approached the Court to complain that the study had yet to be completed and that they believed more than enough time had passed for the legislature to complete its obligation.

On January 28, 2005, the Court gave the State until the close of the 2005 legislative session to comply with the Court's Order and essentially to fulfill its promise to set the appropriate funding for ELL programs. When the Court issued that Order, it had already been asked by the Plaintiffs to apply sanctions for the State's failure to live up to its obligation. It was with that backdrop that the Court gave the legislature and the State one last chance to comply with Judge Marquez' Order of February 2000.

Defendants allege that they take their obligation to establish adequate funding for ELL programs very seriously. Defendants assert that due to good faith differences between the States' executive and legislative branches as it pertains to the needs of the ELL students, they were unable to enact the legislation contemplated by the January 28, 2005, Court order. Defendants argues [sic] that their non-compliance does not equate to "indifference" as asserted by the Plaintiffs' Motion for sanctions.

The legislature passed HB 2718 at the end of the 2005 session, and the Governor vetoed it because

she believed it was inadequate to comply with the Court's Order. Not much activity has transpired since. The legislature believes that it has complied with the Court's Order. The Governor disagrees. Whether or not the legislative or executive branch is right or wrong and whether or not either has acted in good faith is of no moment because nearly six years have passed since the Court issued the original Order requiring the State to establish adequate funding for ELL programs.

The Court can only imagine how many students have started school since Judge Marquez entered the Order in February 2000, declaring these programs were inadequately funded in an arbitrary and capricious manner that violates ELL students' rights under the EEOA. How many students may have stopped school, by dropping out or failing because of foot-dragging by the State and its failure to comply with the original Order and compliance directives such as the Order issued on January 28, 2005? Plaintiffs are no longer inclined to depend on the good faith of the Defendants or to have faith that without some extraordinary pressure, the State will ever comply with the mandates of the respective Orders issued by this Court.

Plaintiffs contend that after nearly six years, it is clear that using Court Ordered deadlines is not an effective means for enforcing the State's compliance with the EEOA of 1974 and this Court's declaratory judgment. Plaintiffs assert that the establishment of yet another deadline by this Court will not guarantee relief. As such, Plaintiffs argue, that this Court

must consider more meaningful sanctions as a coercive measure to ensure the State's full and swift compliance and provide ELL students with the rights to which they are entitled under the law.

I. Motion for Injunctive Relief

Plaintiffs assert that in 1991, the State Board of Education adopted academic standards that prescribed the content knowledge in subjects including reading, writing and mathematics that students should master at every grade level. Plaintiffs also assert that after the adoption of the academic standards, legislation was enacted that required the State Board of Education to adopt a competency test as a prerequisite to graduation from high school A.R.S. § 15-701.01(A)(3). The AIMS test is designed to measure student achievement of the State Board adopted academic standards in reading, writing and mathematics. A.R.S. § 15-741.

Plaintiffs contend, regardless of their performance, requiring ELL students to pass the AIMS test to graduate while being denied the equal participation guaranteed to them under federal law, is patently unfair. Plaintiffs assert that this case was filed to protect the rights of ELL students under the EEOA to equal participation in instructional programs. 20 U.S.C. § 1703(f). As such, Plaintiffs argue that the relief this Motion seeks is necessary to ensure that ELL students are not harmed any further by the State's intransigence as it pertains to the Court's order and the law.

Appendix F

Plaintiffs assert that regardless of AIMS test scores, ELL students have been attending schools with ELL programs that this Court declared are illegally underfunded. Additionally, Plaintiffs argue, it is unfair to those students that they be required to pass a graduation test that is premised on a system in which all students have the same opportunity to achieve the State's academic standards. Plaintiffs further argue that the relief requested in this motion would be necessary even if ELL students as a group, were performing as well as, or better than, their peers on the AIMS test.

Plaintiffs state that the ELL failure rate is more than three times the failure rate of English proficient students. Plaintiffs contend that 82% of ELL students continue to fail the AIMS test in reading and 81% ELL students continue to fail in writing. As such, Plaintiffs argue without adequately funded programs, ELL students cannot be expected to succeed to the same extent as their peers until the language barriers that impede their equal participation are removed as required by the EEOA.

Plaintiffs argue that this Court should exercise its broad equitable powers to protect ELL students from permanent and irreparable harm due to the State's continuing failure to comply with the Court's judgment and the EEOA. Plaintiffs argue that if past discrimination is sufficient for the exercise of the Court's equitable powers, then the current discrimination that is visited on ELL students by the State should be more than sufficient to invoke the Court's equitable powers to protect ELL students.

See Spallone v. United States, 493 U.S. 265, 276 (1990).

Here, Plaintiffs argue that courts have enjoined the administration of high stakes graduation tests when their application would be unfair or perpetuate past discrimination. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). In, [sic] *Debra P.*, the Court enjoined the administration of the graduation test on both due process and equal protection grounds.[1] Plaintiffs argue that the application of *Debra P.*, in this case is clear. Plaintiffs contend that just as it was unfair to punish black students for deficiencies created by the dual school system in *Debra P.*, it would be equally unfair to punish ELL students for the deficiencies caused by Arizona's continuing failure to adequately fund ELL programs. As such, Plaintiffs request that the Court enjoin the State from requiring ELL students to pass the AIMS test in order to graduate from high school. Additionally, Plaintiffs request that the AIMS test not be used to preclude ELL students from graduating until ELL programs have been adequately funded for a sufficient period of time so that ELL students will have a meaningful opportunity to achieve the academic standards that are assessed by the AIMS test.

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[1] In *Debra P.*, the Court determined that, in part, the failures of black students taking the test could be attributed to the unequal education they received during the period when Florida maintained a dual school system based on race.

Appendix F

Defendants assert that the AIMS issue raised by the Plaintiffs was rejected by the Court in 1999. Defendants further argue that Plaintiffs did not appeal that decision and cannot now circumvent that ruling by claiming they are entitled to the same result as a way of enforcing compliance with the Court's EEOA ruling. Defendants also contend that Plaintiffs failed to meet their burden of proof as it pertains to the AIMS test.

Defendants contend that the Court prefaced its January 2000 Order by noting that the August 1999 trial "addressed only two specific issues ...1) whether or not Defendants' [sic] adequately fund and oversee the LAU program in NUSD, and 2) whether or not the AIMS test disparately impacts minority students at NUSD." *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1226 (D. Ariz. 1999).[2] Finally, Defendants argue that although Arizona is approaching the first year in which passing the AIMS test will be a requirement for graduation from high school for all students, this is a fact that Plaintiffs knew six years ago.[3]

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[2] The Court then stated, "Plaintiffs' Second Amended Complaint did not include the AIMS Challenge; nevertheless, the Court heard the parties' arguments and finds that Plaintiffs failed to present evidence at trial to make a prima facie case of disparate impact." *See also Lau v. Nichols*, 414 U.S. 563 (1974).

[3] "The State Board has also determined that in order to receive high school diplomas, all students in the Arizona public school system, except those with certain disabilities, must earn satisfactory AAS/Essential Skills scores on the AIMS tests,

Here, Defendants contend that Plaintiffs are reduced to arguing that they are entitled to relief because ELL students attend schools that this Court declared are illegally underfunded. Defendants argue that this logic is incorrect for two reasons. First, it would effectively allow Plaintiffs to use their victory on their EEOA claim as a basis for getting relief on the AIMS clam [sic] that they lost. Second, passing the AIMS test is not the only graduation requirement for Arizona students including ELL students. There are a number of graduation requirements, for example, a minimum number of credits that students must successfully complete. Defendants contend that under Plaintiffs' arguments, if the AIMS testing requirement is not imposed on ELL students this year, it should not have been imposed at any time over the past 5 years.

Defendants argue that granting relief requested by Plaintiffs might actually create rather than eliminate impermissible disparate treatment and thus possibly raise equal protection issues. Defendants contend the non-application of the AIMS test would raise significant equal protection issues because ELL students would be exempt from passing the AIMS test, however, the AIMS test graduation requirement would stand for all non-ELL students.

Defendants contend that Plaintiffs not only failed to present a prima facie claim, but they failed to even explain how requiring ELL students to pass

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effective in 2000-2001." *Flores v. Arizona*, 48 F. Supp [sic] 2d 937, 956 (D. Ariz. 1999).

the AIMS test to graduate violates due process and equal protection rights. Defendants argue that in *Debra P.*, the Court initially concluded that due process concerns were implicated because the testing requirement was imposed at "the eleventh hour."[4] Unlike *Debra P.*, Defendants argue, Arizona students have had nearly ten years notice that passing the AIMS test would become a graduation requirement. Defendants further state that the underlying district court decision in *Debra P.* found four to six years sufficient.[5] Defendants contend that *Debra P.* did find an equal protection violation that was based on the trial court's finding that black students' poor performance on the exit exams was related to Florida's relatively recent operation of a school system segregated on the basis of race. However, Defendants argue, no such claim has been made here.

Defendants argue that Plaintiffs failed to mention that, upon remand, the district court lifted its injunction against the use of high stakes testing, *Debra P. v. Turlington*, 564 F. Supp. 177, 189 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

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[4] *Debra P.*, 644 F.2d 397 (5th Cir. 1981).

[5] *Debra P.*, 730 F.2d at 1407 (citing *Debra P. v. Turlington*, 474 F. Supp. at 244, 267) (M.D. Fla. 1979); *cf. Williams v. Austin Indep. Sch. Dist.*, 796 F. Supp. 251, 253-54 (W.D. Tex. 1992) (upholding exit exam requirement and distinguishing *Turlington* because "In this case, students in Texas have known for seven years that they must pass a comprehensive examination before receiving their diplomas.").

Defendants state the court did so because of its decision that the Florida test was "constitutionally impermissible only if the disproportionate failure rate among black students is due to the learning deficits created by the past segregation of the Florida public schools or its effects." *Id.* at 188.

Defendants argue students have known for years that passage of the AIMS test would eventually be required for graduation; students have five separate opportunities to pass the test; and the State has made available tutoring funds for remedial efforts designed to help students, including ELL students, who may need additional assistance. Additionally, Defendants argue, under recently enacted legislation, students graduating in 2006 or 2007 will be able to apply grades received in some high school classes to augment their AIMS test scores. A.R.S. § 15-701.01.

Defendants state that the Tenth Amendment requires that the Court should give due deference to the State's decision to require students to pass the AIMS test. Defendants argue that in the absence of proof of discrimination, courts are rightly reluctant to interfere with the great latitude given the States in the area of education. Defendants state that even the cases Plaintiffs cite acknowledge this principle. Also, Defendants argue that the *Williams* court acknowledged this principle in its analysis.[6]

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[6] "The level of education and academic achievement necessary to obtain a diploma . . . is appropriately a judgment call for the person elected for that state responsibility and those

Defendants submit that Plaintiffs have failed to prove the extraordinary circumstances that would warrant the extraordinary interference they seek. As such, Defendants argue that Plaintiffs' motion seeks a remedy for a claim that they not only have not proved, but that has been rejected. Defendants' [sic] request that Plaintiffs' motion be denied.

As an alternative, Plaintiffs assert, Defendant's lack of concern for Arizona's ELL students and lack of respect for this Court's orders, the Court should enjoin the receipt of federal highway funds. Plaintiffs also ask the Court to delay the proposed sanctions for at least 30 days from the issuance of the Court's order so that the Defendants have an opportunity to enact the remedial legislation that is required.

The Court views their request for injunctive relief as different and distinct from determining that the AIMS test is biased or has a disparate effect. This is about requiring something of ELL students for which the State has failed to provide the proper foundation and for which the State still wishes to require ELL students to nevertheless hold up the walls.

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experienced persons responsible for educating and preparing students to achieve the established level of competence. Any interference in this process is simply destructive to the attempts by the state to salvage its education system, and this includes interference by the federal judiciary." 796 F. Supp. at 256.

Plaintiffs submission that more than 80% of ELL students in high school have failed the AIMS graduation test is adequate for injunctive relief in light of the egregious delay in complying with the Court's Orders. Until Defendants make the appropriations required for properly funding ELL programs, the State is requiring something of ELL students for which the State has failed to provide the proper foundation. The Court's finding that the AIMS test be enjoined for ELL students is based soley [sic] on the facts of this case, and the February 2000 Order, and is not to be construed as any broad characterization of whether or not the AIMS test has a disparate effect on limited English speaking students.

II. Defendant's Request for Court to Make a Ruling

Defendants allege that monies made available through No Child Left Behind ("NCLB") and other funds are now a significant part of the ELL landscape. Defendants argue that the Court should decide whether and to what extent those federal funds can be used in determining the adequacy of ELL funding in Arizona. Defendants assert that in their response to Plaintiffs' motion for injunction on January 9, 2002, they stated that the NCLB "will significantly affect public education in general and the provision of language acquisition programs." Defendants contend that the issue of whether HB 2010 should be evaluated by considering all available funding for ELL programs, including that provided by federal funds was not addressed by the Court.

Defendants further argue that in the Court's January 28, 2005, Order, it did not say whether Federal funds may be considered in deciding whether the State has "appropriately and constitutionally" funded its ELL programs.

Plaintiffs contend that federal funding was addressed at the trial in this case and discussed in the Court's judgment.[7] Plaintiffs state that Defendants request for the Court to consider federal funding is an attempt to relitigate issues that the Court has already decided. Plaintiffs argue that statutorily, federal funds must supplement and not supplant the State's obligation.[8] Moreover, Plaintiffs argue if the Court were to take time to issue an advisory opinion in this matter, its only outcome would be more delay and would not resolve anything at all.

The Court agrees. The Court sees this issue as a request to issue an advisory opinion and declines to do the same.

Plaintiffs state that the Court should award their attorney's fees due to Defendant's non-compliance with the Court's judgment on January 28, 2000. Plaintiffs allege that for nearly six years the State has done nothing to comply with the Court's judgment. Plaintiffs argue that after the Court ordered the State to perform a cost study in

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[7] *Flores*, 172 F.Supp.2d at 1236-7 (D. Ariz. 2000)

[8] No Child Left Behind Act, P.L. 107-110, Secs: 1114(a)(2)(B), 3115(g).

October of 2000, the State took no action even though the cost study was performed. Also, Plaintiffs contend that they returned to the Court to establish a deadline for compliance in August of 2004 however, the cost study was not submitted. As a result, Plaintiffs state they returned again to the Court in an effort to ensure compliance. Finally, Plaintiffs argue that the State has failed to comply and request the Court to award attorney's fees and costs for the work related to enforcement of the Court's orders that they have performed on this case since judgment was issued on January 24, 2000.

LEGAL STANDARD

The Court has jurisdiction over the present action against Defendants by its order dated January 28, 2005, and under the Declaratory Judgment Act, A.R.S. §§ 12-1831 et seq., A.R.S. § 12-864, and Rule 65 (d) of the Federal Rules of Civil Procedure.

"Courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). This power has been relied on to hold city and state legislatures in contempt. *See Spallone v. United States*, 493 U.S. 265, 276 (1990). "When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers." *Id.* However, these powers are not unlimited, and the Court is obliged to use the "least possible power adequate to the end proposed." *Id. quoting Anderson v. Dunn*, 19 U.S. 204, 231 (1821). In devising a remedy, the Court must take into account

the interests of State and local authorities in managing their own affairs, consistent with the Constitution. *Id.*

A district court has the power to adjudge in civil contempt any person who willfully disobeys a specific and definite order of the court. *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir. 1984). However, the contempt does not need to be willful and there is no good faith exception to the requirement of obedience to a court order. *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). A court has wide latitude in determining whether there has been contemptuous defiance of its order. *Gifford*, 741 F.2d at 266. A party should not be held in contempt if the "action appears to be based on a good faith and reasonable interpretation of the [court's order]." quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). "Substantial compliance" with the court order is a defense to civil contempt. *Id.* The party alleging civil contempt must demonstrate the alleged contempt or violation of the court's order by clear and convincing evidence, not a preponderance of the evidence. *Id.* While the set of rules the court should use is easy to articulate, they may be difficult to apply. *Id.* The court should determine (1) that the party violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence. *Id.* The record in this case supports that the Plaintiffs have passed this test.

Appendix F

DISCUSSION AND ANALYSIS

It is therefore the judgement[sic] of the court that the State has failed to comply with this Court's Order, and the Court will apply appropriate sanctions. The Plaintiffs have asked the Court to enjoin the State from receipt of federal highway funds as a sanction. The Court does not think this is an appropriate remedy.

The American Council of Engineering Companies of Arizona and Associated General Contractors of America, Arizona Chapter ("Intervenors") argue that Plaintiffs' motion for sanctions are not related to Arizona's highway funding. Also, Intervenors assert that the Plaintiffs' request for sanctions is made without consideration or respect of the limitations on the authority of the Court both as a matter of applicable law, inherent powers of equity, and the Constitution of the United States. Intervenors further argue that if the relief sought by Plaintiffs is granted, it would have a direct, immediate, and significant impact on Intervenors' member firms.

The Court must use the least possible power to the end proposed. The remedy the Plaintiffs request, enjoining federal highway funds, has no relationship to ELL students. If the Court were to enjoin federal educational funds, it would not only harm ELL students, it would hurt all students in the Arizona school system. Therefore, the Court will DENY Plaintiffs' request to enjoin the receipt of federal highway funds as a sanction.

Appendix F

During the October 2005 hearing, mention was made whether someone should go to jail. Under the circumstances, this is not an appropriate remedy at this time.

The Court has been asked by the Plaintiffs to enjoin the state from requiring that ELL students be subject to passing the AIMS test as a graduation requirement until such time as ELL student's education have been funded at an appropriate level and have had appropriate time to benefit from such funding.

The state of Arizona has spent a great deal of time dealing with the AIMS situation and revised the test several ways to increase the passage rates of those students who are required to take it. However, the State has failed to comply with the Court's judgment for almost six years by under-funding ELL programs, which would provide ELL students with the necessary tools to pass the AIMS test. The State's offering tutoring outside the classroom and other things to all students for the purpose of passing the AIMS test does not remedy the fact that the under-funded ELL programs deprive ELL students of an equal opportunity to pass the AIMS test in the first instance.

The Court therefore **GRANTS** the injunction for relief requested by the Plaintiff and orders that ELL students not be required to pass the AIMS test to secure their diploma until the State has properly funded ELL programs and there has been sufficient time to allow ELL students to compete equally on the test.

Appendix F

SANCTIONS

Accordingly,

IT IS ORDERED that until Defendants fully comply with the mandates of the February 2000 Order, the State is enjoined from requiring ELL Students to pass the AIMS test as a requirement for graduating from high school.

FURTHER, it is ordered that upon full compliance, the State may file a motion to lift the injunction and present evidence as to the reasonable time ELL students should remain exempt from the AIMS test as a requirement for high school graduation.

FURTHER, it is ordered that the legislature has 15 calendar days after the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order. Everyday thereafter and for the ensuing 30 days that the State fails to comply with this Order, a **$500,000** per day fine for the next 30 days will be imposed until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a **$1 million dollar** per day fine for the following 30 days until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a **$1.5 million dollar** per day fine until the end of the 2006 legislative session.

FURTHER, if after that, the State has not complied by the end of the 2006 legislative session a

$2 million dollar per day fine will be imposed until the State has complied with the January 28, 2005 Court order.

FURTHER, it is therefore ordered that Defendants' are to pay Plaintiffs' reasonable attorney's fees for the time period beginning after the January 28, 2005, Court order. Plaintiffs counsel is to submit calculations for said attorney's fees and a proposed order for the Court to approve.

DATED this 15th day of December, 2005.

/s/

Raner C. Collins
United States District Judge

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL ORDER - MINUTE ENTRY)

Case No.:
CV-92-596-TUC-RCC Date: March 14, 2006

Title: MIRIAM FLORES, et al., v.
STATE OF ARIZONA, et al.

HONORABLE RANER C. COLLINS

On March 8, 2006, and pursuant to Rules 24(a) and (b), Fed.R.Civ.P., the Speaker of the Arizona House of Representatives ("Speaker") and President of the Arizona Senate ("President") filed a Motion to Intervene (Docket No. 382). Accordingly, IT IS HEREBY ORDERED THAT Permissive Intervention is **GRANTED** in this matter to both the Speaker and the President.

FURTHER, IT IS ORDERED that briefing on the Motion to Purge filed [sic] the Speaker and the President be set consistent with the schedule established by the Court on March 8, 2006, so that responses by existing parties would be filed on March 24, 2006, and the Speaker and the President can file there [sic] reply, if any, on March 31, 2006.

FURTHER, IT IS ORDERED that the Speaker and the President can include any argument in their brief on their Motion to Purge during the hearing scheduled for April 3, 2006 at 1:30 p.m.

/s/
Raner C. Collins
United States District Judge

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al.,	)	No. CV92-596-TUC-RCC
	)	ORDER
Plaintiffs,	)	
vs.	)	
STATE OF ARIZONA, et al.,	)	
Defendants.	)	

On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of Bill 2064 (Docket No. 373) and Defendant State of Arizona filed a Motion to Expedite Consideration of State's Motion for Accelerated Consideration of Legislation (Docket Nos. 374 - 375). On March 8, 2006, the Court held a telephonic status hearing and requested the parties to brief the Court on H.B. 2064 ("Act") to determine if the Act satisfied both the December 2005 Court Order and the January 2000 Judgment in this matter.

On April 3, 2006, a hearing was held and the Court took the case under advisement. The Court has considered the following memorandum and supporting documents: Defendant Thomas Horne's

Memorandum in Support of the Act (Docket No. 414); Defendant State of Arizona's Opening Brief (Docket No. 415); Plaintiff Miriam Flores' Brief Regarding Sufficiency of House Bill 2064 (Docket No. 419); Amicus Arizona School Boards Association's Brief *Amicus Curiae* Brief (Docket No. 425); Amicus House and Senate Democratic Caucuses of the Arizona Legislature's Brief (Docket No. 427); Plaintiff Miriam Flores' Brief (Docket No. 428); and Intervenor Parties Speaker of the House/President of the Senate's Brief Replying to Opening Briefs of Plaintiffs and Attorney General (Docket Nos. 422 and 434).

As set forth below, the Act does not satisfy the January 2000 Judgment or the December 2005 Order. As such Intervenor's Motion to Purge Contempt, Dissolve Injunctions, Declare Orders Satisfied, and Set Aside Injunctions (Docket No. 422) is DENIED.

DISCUSSION

In January 2000, after eight years of protracted litigation, the Court held that the State's minimum base level for funding the Lau programs - now being called English Language Learner Program ("ELL")- was arbitrary and capricious and bears no relation to the funding needed to ensure children are achieving the State's specified minimum standards. *See Flores v. Arizona*, 172 F.Supp.2d 1225, 1239 (D.Ariz.,2000).[1]

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[1] A 1987-1988 cost study determined that it would take $450 per LEP student to appropriately fund the program. The State

Appendix H

In January 2005, the Court ordered that the Defendants had until the end of the legislative session to comply with the January 2000 Judgment by appropriately funding the State's ELL programs. In December 2005, the Court held the Defendants had yet to comply with either the January 2000 Judgment or January 2005 Order and found the Defendants in civil contempt.

The Court acknowledges that the landscape with regard to ELL programing [sic] has changed since the original Court Order of 2000. The method of delivery has been changed by the voters and implemented by the State of Arizona to that of a language immersion program. There has been some progress made in the Nogales Unified School District ("NUSD") with regard to improved academic success for some elementary and junior high school students.

Since the original Court Order, the federal law, 20 U.S.C.A. § 1703, the Equal Education Opportunity Act ("EEOA"), has not changed. It is still a requirement that the State under the Elementary and Secondary Education Act ("ESEA") provide funding for ELL students that is not arbitrary and capricious. The State under § 9522 of ESEA must assure the federal government that it

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Defendants questioned the study and determined it to be unreliable yet, it was never updated. Based on that cost study the State appropriated $150.00 per limited English proficient ("LEP") student. The most recent study, again discredited by the legislature, put the cost of funding the ELL program substantially higher.

uses these funds according to federal law. It is still the law that a State may not consider the use of federal funds to determine eligibility of a district or charter school for State funding. Finally, the No Child Left Behind ("NCLB") program did not supercede the State's duty to properly fund the ELL program. The Act does not satisfy the Court Order of 2000, nor does it comply with federal law in several respects.

HOUSE BILL 2064

The Arizona Legislature adopted the Act and it became law on March 9, 2006. The Speaker of the Arizona House of Representatives ("Speaker") and President of the Arizona Senate ("President") contend that the Act satisfies applicable federal law and the judgment and orders of this Court when considered by itself or alternatively, when considered in combination with the massive reforms of Arizona K-12 education since 2000. The Court disagrees. The Act does not bare [sic] any rational relationship to the cost of providing an ELL program, as originally indicated by Judge Marquez, and it has added new hurdles to the mix.

Amount of Funding

The Act provides almost the same amount of funding for ELL programs as was provided during the last legislative session. The Act increases Group B weight of $355 per ELL student to $432 per ELL student. Although this amounts to a $77 increase, it is $18 dollars short of the "unreliable" cost study done nearly eighteen years ago, which estimated a

$450 per student cost. In fact, the Act does not explain how this $77 increase in the Group B weight was derived. The State has not shown that this increase has any rational relationship to any ELL program.

The cost of implementing the ELL program has not been established by the Act. The Court cannot determine if the $77 increase bears any rational relationship to the actual cost of the ELL program or that it adequately funds the ELL program in a non-arbitrary and capricious manner. It was required under Judge Marquez' Order that the State was to establish minimum standards for providing funding and program oversight. The Act does not do it.

It was contended by attorneys for Intervenors for the Arizona House and Senate and the Superintendent that a Task Force was to be established by the Legislature to set the minimum standards and requirements for the ELL program to be followed by Arizona district schools and charter schools. The Act states that the Task Force shall develop and adopt research based models of structured English immersion programs for use by school districts and charter schools. The Act is silent on whether these models are "standards" to be used by the school districts and charter schools. If these models are indeed standards, then this would be a step towards an appropriate remedy. The final step must include a per student cost assessment for implementing these models, and a rationally related funding level appropriated by the State legislature.

Appendix II

Federal Funds

The Act creates a task force that authorizes districts and charter schools to request State funding to cover the incremental costs of ELL programs, however, it subtracts certain federal funds from the amounts schools are allowed to request. The Act requires districts and charter schools to use Title I, Title II, and Title III monies to offset its funding for ELL programs. Federal funds are to supplement, not supplant State funds for education. States that receive Title I, Title II, and Title III monies of the No Child Left Behind Act ("NCLB") are not to use those funds to supplant State funds allocated for those programs. 20 U.S.C.A. § 6314 provides that:

> A school participating in a school wide program shall use funds available to carry out this section only to supplement the amount of funds that would, in 1. the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

20 U.S.C.A. § 6314 (B). 20 U.S.C.A. § 6613 provides that:

> Funds received under this subpart shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

20 U.S.C.A. § 6613 (f). 20 U.S.C.A. § 6825 provides that:

> Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

20 U.S.C.A. § 6825 (g). It is clear that the Act requires schools to used[sic] federal funding to finance a State obligation. Federal funds according to federal law can only be used to supplement that obligation.

The State has an obligation to ensure it uses federal funds according to federal law. The Act does not state with any specificity how federal monies will not supplant State funds for the ELL program. The Act reminds district schools and charter schools they must adhere to all State and federal laws, but requires them, by using offsets, to violate federal law. The offsets established by the Act, violate federal law by supplanting federal dollars for State public funds for education. The Act forces district schools and charter schools to under-fund their ELL programs or other programs by the use of these offsets. These provisions of the Act clearly violate the rule against supplanting state public funds.

The Act also requires schools to offset their ELL program requests by using Impact Aid monies. A.R.S. § 15-756.01(I) states in pertinent part that the State ". . . shall only apply unused impact aid monies to ELL programs after it has applied its impact monies for other allowable uses. . . ." A.R.S. § 15-756.01(I)(3).[2] However, 20 U.S.C. § 7709 prohibits States from taking impact aid payments into account for un-certified uses as determined by the U.S. Secretary of Education. 20 U.S.C. § 7709(c)(3). This provision of the Act violates federal law.

The Superintendent contends that the Act does not misuse federal funds, however, the offsets violate federal law by forcing district schools to misuse previously allocated federal funds. The Act requires school district schools to offset from their ELL budget requests "a portion of desegregation monies levied pursuant to A.R.S. § 15-910." A.R.S. § 15-756.01(I)(4). Section 15-910 allows a school district under a Court Order of desegregation or the U.S. Department of Education's Office of Civil Rights ("OCR") Agreement to obtain funds to be used solely for "remedying alleged or proven racial discrimination." A.R.S. § 15-910(G). District schools cannot transfer or offset funds as the Act requires because it would hamper their duty to comply with court-ordered desegregation mandates and requirements in their OCR agreements.

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[2] A.R.S. 15-756.01 became effective on March 9, 2006.

Appendix H

The *Amicus* Arizona School Boards Association, Tucson Unified School District ("TUSD") and Tempe Elementary School District ("TESD"), explain how in their view they will receive inadequate ELL funding from the State under the Act. Outside of Group B weighted monies, the Act will completely eliminate the State's obligation to provide funding for TUSD and TESD for ELL programing[sic]. The Act would require TUSD to subtract 13% of its desegregation monies, or $8,060,000, from the State's ELL program obligation because 13% of TUSD students are classified as ELL. This single offset equates to more than $1,100 per district ELL student. The Act would require TESD to subtract 22% of its desegregation monies, or $2,860,000, from the State's ELL program obligation. This offset amounts to $900 per district ELL student. The Act would require both TUSD and TESD to make Title I, IIA, III and Impact aid offsets as well. Requiring districts such as TUSD, TESD, and other similarly situated districts to offset desegregation monies and other federal funds in this manner, violates federal law. The Act jeopardizes their continued receipt of those funds and ability to fulfill their court-ordered obligations and agreements.

The Act does not offer any guidance to those schools in how to use this provision without violating federal law, Court Orders, or consent decrees. By reducing the State's ELL funding obligation by a specified percentage of a district school's desegregation money, the Act contradicts federal mandates and Court orders that control the use of

those monies. The Act in this respect also violates federal law.

Two-Year Limitation

Pursuant to A.R.S. § 15-756.04(C) the Act imposes a two-year limit on funding to each school for the education of each ELL student. Under this section, a student will be cut from the Group weight B category if he or she does not become proficient in English within two years. The district will continue to receive base level funding for the student, but it will not receive either the ELL support level weight or any extra money from the Structured English Immersion ("SEI") fund.

The Act creates a compensatory instruction fund. Under the Act, instruction outside of the school year and school day shall be provided with "compensatory" instruction funds, pursuant to A.R.S. 15-756.11. This includes individual or small group instruction, extended day classes, summer school, or intersession school. A.R.S. 15-756.11(G) limits the compensatory fund to ELL students who have been reclassified as English proficient within the two previous years. Pursuant to the Act, outside of the school day or year, students who were not reclassified as English proficient can not participate in any of the programs created to improve their English skills. A student would need to be reclassified as English proficient before any district or charter school could apply for these funds. This provision will only hinder the progress of both district schools and charter schools, who are working

hard to help ELL students become English proficient.

The purpose of the ELL program is to enable a student to meet the minimum standards set by the State of Arizona, not to punish both the student and the school despite their best efforts. The two-year requirement might be a goal for district and charter schools to obtain, but it should not be a cut-off provision for ELL program funding. The EEOA requires the State to take appropriate action to overcome language barriers that impede equal educational participation by students. 20 U.S.C. § 1703(f). The EEOA does not impose a time limitation and the State's funding obligation is a continuing one until students have overcome language barriers that impede their participation. The two-year limitation under the Act without an exception is contrary to the EEOA, poses a significant burden on both the schools and the students and denies students access to funding regardless of their academic standing.

CONCLUSION

The Act does not comply with the Court's Judgments and Orders. On its face, the Act does not appropriately fund the ELL program. The Act fails to delineate the cost of providing a viable ELL program. The Act does not explain the basis for the $77 increase for Group B weight students or how the $432 appropriation is rationally related to the ELL program. The $432 appropriation is more than current funding, however it is less than the amount that was discredited in a "cost study" that was done

more than eighteen years ago, and less than the amount that was determined by the now "discredited" cost study held two years ago. Based on the Act, there is no way to determine if the models are indeed standards for school districts and charter schools to follow. The two-year limitation is a violation of federal law. The offsets of federal funds such as Title I, IIA, III, Impact aid and desegregation monies also violate federal law.

The Act fails to satisfy Judge Marquez' January 2000 Court Order. It also does not comply with Federal Law. Therefore, the Court finds that the Act does not satisfy both the January 2000 and January 2005 Court Orders. The parties are referred back to the Court's December 2005 Order.

DATED this 25th day of April, 2006.

/s/

Raner C. Collins
United States District Judge

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRIAM FLORES,
Plaintiff-Appellee,

v.

ROSA RZESLAWSKI,
individually, and as a parent of
Mario Rzeslawski, a minor child,
Plaintiff-Appellee,

THOMAS C. HORNE,
Superintendent
of Public Instruction, State of
Arizona,
Defendant-Appellant,

and

STATE OF ARIZONA; C.
DIANE BISHOP; EUGENE
HUGHES; DAVID SILVA;
CLAUDINE BATES ARTHUR;
JOHN HOSNER; KEN
BENNETT; RAY KELLIS; JIM
ALLMAN; MORRISON
WARREN, members of the State
Board of Education,
Defendants,

No. 06-15378

D.C. No. CV-
92-00596-RCC

MEMORANDUM*

Appendix I

AMERICAN COUNCIL OF ENGINEERING COMPANIES OF ARIZONA; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ARIZONA CHAPTER,
Defendant-Intervenors.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

* * *

[Remainder of caption pages omitted]

* * *

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding
Argued and Submitted July 25, 2006

San Francisco, California

Before: HUG, KLEINFELD, and PAEZ, Circuit Judges.

This case deals with the consolidated appeals of several district court orders. The first several orders found the State of Arizona in civil contempt of the district court's previous order to reform the State's English Language Learner (ELL) program, enjoined administration of the AIMS test to ELL

students as a requirement for graduation until the program had been reformed, and provided for the distribution of the fines collected to school districts to fund ELL programs. The second order rejected House Bill 2064, determining it failed to comply with the court's original order.

In the interim, the landscape of educational funding has changed significantly. We have held that, because "the scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. . . .federal courts must be sensitive to the need for modification [of permanent injunctive relief] when circumstances change."[1] In light of the changes in education programs and funding since the original 2000 court order, the district court should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy. The orders of the court holding the defendants in contempt and rejecting House Bill 2064 are therefore vacated and the case is remanded to the district court. Because we hold that the district court should have held an evidentiary hearing on changed circumstances, we need not, and do not, reach any of the other issues in the case.

VACATED AND REMANDED.

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[1] Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995).

Appendix J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CIVIL MINUTES - GENERAL

Date: January 5, 2007

Civil Case No. CV 92-596-TUC-RCC

Title MIRIAM FLORES, et al. vs. STATE OF ARIZONA, et al.

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Present:

HON. RANER C. COLLINS

Deputy Clerk: Maureen Gorski	Court Reporter: Bonnie Brunott
ATTORNEY(s) FOR PLAINTIFF(S)	ATTORNEY(s) FOR DEFENDANT(S)
Timothy Hogan/ Joy Herr-Cardillo	Jose Cardenas/Susan Segal/ Eric (Rick) Bistrow/ David Cantelme

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PROCEEDINGS: XX Open Court - TELEPHONIC MOTION TO CONTINUE EVIDENTIARY HEARING:

Counsel present arguments to the Court.

IT IS ORDERED DENYING the following motions:

Defendant/Intervenor Speaker of the House/President of the Senate's motion to continue evidentiary hearing/trial (#578); Superintendent of

Appendix J

Public Instruction Thomas Horne's motion to continue (#572); and all Motions in Limine filed by Defendant/Intervenor Speaker of the House/President of the Senate regarding testimony (#556; 558; 559; 560; 561;).

Evidentiary hearing is confirmed for Tuesday, January 9, 2007 at 10:00 am.

Four days have been scheduled for this hearing.

Appendix K

20 U.S.C. § 6311

§ 6311. State Plans

(a) Plans required

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan, developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators (including administrators of programs described in other parts of this subchapter), other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act, the Carl D. Perkins Career and Technical Education Act of 2006, the Head Start Act, the Adult Education and Family Literacy Act, and the McKinney-Vento Homeless Assistance Act.

(2) Consolidated plan

A State plan submitted under paragraph (1) may be submitted as part of a consolidated plan under section 7842 of this title.

(b) Academic standards, academic assessments, and accountability

Appendix K

(1) Challenging academic standards

(A) In general

Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.

(B) Same standards

The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State.

(C) Subjects

The State shall have such academic standards for all public elementary school and secondary school children, including children served under this part, in subjects determined by the State, but including at least mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science, which shall include the same knowledge, skills, and levels of achievement expected of all children.

(D) Challenging academic standards

Standards under this paragraph shall include--

(i) challenging academic content standards in academic subjects that--

(I) specify what children are expected to know and be able to do;

(II) contain coherent and rigorous content; and

(III) encourage the teaching of advanced skills; and

(ii) challenging student academic achievement standards that--

(I) are aligned with the State's academic content standards;

(II) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the State academic content standards; and

(III) describe a third level of achievement (basic) to provide complete information about the progress of the lower-achieving children toward mastering the proficient and advanced levels of achievement.

(E) Information

For the subjects in which students will be served under this part, but for which a State is not required by subparagraphs (A), (B), and (C) to develop, and has not otherwise developed, such academic standards, the State plan shall describe a strategy for ensuring that students are taught the same knowledge and skills in

such subjects and held to the same expectations as are all children.

(F) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standard adopted under this part before or after January 8, 2002.

(2) Accountability

(A) In general

Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph. Each State accountability system shall--

(i) be based on the academic standards and academic assessments adopted under paragraphs (1) and (3), and other academic indicators consistent with subparagraph (C)(vi) and (vii), and shall take into account the achievement of all public elementary school and secondary school students;

(ii) be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State, except that public elementary schools, secondary schools, and local

educational agencies not participating under this part are not subject to the requirements of section 6316 of this title; and

(iii) include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress in accordance with the State's definition under subparagraphs (B) and (C).

(B) Adequate yearly progress

Each State plan shall demonstrate, based on academic assessments described in paragraph (3), and in accordance with this paragraph, what constitutes adequate yearly progress of the State, and of all public elementary schools, secondary schools, and local educational agencies in the State, toward enabling all public elementary school and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.

(C) Definition

"Adequate yearly progress" shall be defined by the State in a manner that--

(i) applies the same high standards of academic achievement to all public elementary

school and secondary school students in the State;

(ii) is statistically valid and reliable;

(iii) results in continuous and substantial academic improvement for all students;

(iv) measures the progress of public elementary schools, secondary schools and local educational agencies and the State based primarily on the academic assessments described in paragraph (3);

(v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following:

(I) The achievement of all public elementary school and secondary school students.

(II) The achievement of--

(aa) economically disadvantaged students;

(bb) students from major racial and ethnic groups;

(cc) students with disabilities; and

(dd) students with limited English proficiency;

except that disaggregation of data under subclause (II) shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable

information or the results would reveal personally identifiable information about an individual student;

(vi) in accordance with subparagraph (D), includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years) and at least one other academic indicator, as determined by the State for all public elementary school students; and

(vii) in accordance with subparagraph (D), at the State's discretion, may also include other academic indicators, as determined by the State for all public school students, measured separately for each group described in clause (v), such as achievement on additional State or locally administered assessments, decreases in grade-to-grade retention rates, attendance rates, and changes in the percentages of students completing gifted and talented, advanced placement, and college preparatory courses.

(D) Requirements for other indicators

In carrying out subparagraph (C)(vi) and (vii), the State--

(i) shall ensure that the indicators described in those provisions are valid and reliable, and are consistent with relevant, nationally recognized professional and technical standards, if any; and

(ii) except as provided in subparagraph (I)(i), may not use those indicators to reduce the

number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if those additional indicators were not used, but may use them to identify additional schools for school improvement or in need of corrective action or restructuring.

(E) Starting point

Each State, using data for the 2001-2002 school year, shall establish the starting point for measuring, under subparagraphs (G) and (H), the percentage of students meeting or exceeding the State's proficient level of academic achievement on the State assessments under paragraph (3) and pursuant to the timeline described in subparagraph (F). The starting point shall be, at a minimum, based on the higher of the percentage of students at the proficient level who are in--

(i) the State's lowest achieving group of students described in subparagraph (C)(v)(II); or

(ii) the school at the 20th percentile in the State, based on enrollment, among all schools ranked by the percentage of students at the proficient level.

(F) Timeline

Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described in subparagraph (C)(v)

will meet or exceed the State's proficient level of academic achievement on the State assessments under paragraph (3).

(G)Measurable objectives

Each State shall establish statewide annual measurable objectives, pursuant to subparagraph (C)(v), for meeting the requirements of this paragraph, and which--

(i) shall be set separately for the assessments of mathematics and reading or language arts under subsection (a)(3);

(ii) shall be the same for all schools and local educational agencies in the State;

(iii) shall identify a single minimum percentage of students who are required to meet or exceed the proficient level on the academic assessments that applies separately to each group of students described in subparagraph (C)(v);

(iv) shall ensure that all students will meet or exceed the State's proficient level of academic achievement on the State assessments within the State's timeline under subparagraph (F); and

(v) may be the same for more than 1 year, subject to the requirements of subparagraph (H).

(H)Intermediate goals for annual yearly progress

Each State shall establish intermediate goals for meeting the requirements, including the

measurable objectives in subparagraph (G), of this paragraph and that shall--

(i) increase in equal increments over the period covered by the State's timeline under subparagraph (F);

(ii) provide for the first increase to occur in not more than 2 years; and

(iii) provide for each following increase to occur in not more than 3 years.

(I) Annual improvement for schools

Each year, for a school to make adequate yearly progress under this paragraph--

(i) each group of students described in subparagraph (C)(v) must meet or exceed the objectives set by the State under subparagraph (G), except that if any group described in subparagraph (C)(v) does not meet those objectives in any particular year, the school shall be considered to have made adequate yearly progress if the percentage of students in that group who did not meet or exceed the proficient level of academic achievement on the State assessments under paragraph (3) for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more of the academic indicators described in subparagraph (C)(vi) or (vii); and

(ii) not less than 95 percent of each group of students described in subparagraph (C)(v) who

are enrolled in the school are required to take the assessments, consistent with paragraph (3)(C)(xi) and with accommodations, guidelines, and alternative assessments provided in the same manner as those provided under section 612(a)(16)(A) of the Individuals with Disabilities Education Act [20 U.S.C. 1412(a)(16)(A)] and paragraph (3), on which adequate yearly progress is based (except that the 95 percent requirement described in this clause shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student).

(J) Uniform averaging procedure

For the purpose of determining whether schools are making adequate yearly progress, the State may establish a uniform procedure for averaging data which includes one or more of the following:

(i) The State may average data from the school year for which the determination is made with data from one or two school years immediately preceding that school year.

(ii) Until the assessments described in paragraph (3) are administered in such manner and time to allow for the implementation of the uniform procedure for averaging data described in clause (i), the State may use the academic assessments that were required under paragraph

(3) as that paragraph was in effect on the day preceding January 8, 2002, provided that nothing in this clause shall be construed to undermine or delay the determination of adequate yearly progress, the requirements of section 6316 of this title, or the implementation of assessments under this section.

(iii) The State may use data across grades in a school.

(K) Accountability for charter schools

The accountability provisions under this chapter shall be overseen for charter schools in accordance with State charter school law.

(3) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007-2008 school year.

Appendix K

(B) Use of assessments

Each State educational agency may incorporate the data from the assessments under this paragraph into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.

(C) Requirements

Such assessments shall--

(i) be the same academic assessments used to measure the achievement of all children;

(ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards;

(iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards;

(iv) be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this chapter and are consistent with the requirements of this section, and such evidence is made public by the Secretary upon request;

(v) (I) except as otherwise provided for grades 3 through 8 under clause vii, measure the

proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during--

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007-2008, measure the proficiency of all students in science and be administered not less than one time during--

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005-2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the

academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;

(viii) at the discretion of the State, measure the proficiency of students in academic subjects not described in clauses (v), (vi), (vii) in which the State has adopted challenging academic content and academic achievement standards;

(ix) provide for--

(I) the participation in such assessments of all students;

(II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act [20 U.S.C. 1401(3)]) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and

(III) the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students

know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7);

(x) notwithstanding subclause (III), the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;

(xi) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in

determining the progress of the local educational agency;

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xiv) be consistent with widely accepted professional testing standards, objectively

measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information; and

(xv) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items.

(D) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of this title is less than--

(i) $370,000,000 for fiscal year 2002;

(ii) $380,000,000 for fiscal year 2003,

(iii) $390,000,000 for fiscal year 2004; and

(iv) $400,000,000 for fiscal years 2005 through 2007.

Appendix K

(4) Special rule

Academic assessment measures in addition to those in paragraph (3) that do not meet the requirements of such paragraph may be included in the assessment under paragraph (3) as additional measures, but may not be used in lieu of the academic assessments required under paragraph (3). Such additional assessment measures may not be used to reduce the number of or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if such additional indicators were not used, but may be used to identify additional schools for school improvement or in need of corrective action or restructuring except as provided in paragraph (2)(I)(i).

(5) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt curriculum content and student academic achievement standards, and academic assessments aligned with such academic standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by--

(A) adopting academic standards and academic assessments that meet the requirements of this subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(B) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt curriculum content and student academic achievement standards, and academic assessments aligned with such standards, which--

(i) meet all of the criteria in this subsection and any regulations regarding such standards and assessments that the Secretary may publish; and

(ii) are applicable to all students served by each such local educational agency.

(6) Language assessments

Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages,

but shall not mandate a specific academic assessment or mode of instruction.

(7) Academic assessments of English language proficiency

Each State plan shall demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.

(8) Requirement

Each State plan shall describe--

(A) how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the requirements of sections 6312(c)(1)(D), 6314(b), and 6315(c) of this title that is applicable to such agency or school;

(B) how the State educational agency will assist each local educational agency and school affected

by the State plan to provide additional educational assistance to individual students assessed as needing help to achieve the State's challenging academic achievement standards;

(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 6314(b)(1)(C) and 6315(c)(1)(E) of this title, including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps;

(D) an assurance that the State educational agency will assist local educational agencies in developing or identifying high-quality effective curricula aligned with State academic achievement standards and how the State educational agency will disseminate such curricula to each local educational agency and school within the State; and

(E) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging academic content standards adopted by the State.

(9) Factors affecting student achievement

Each State plan shall include an assurance that the State educational agency will coordinate and collaborate, to the extent feasible and necessary as determined by the State educational agency, with agencies providing services to children, youth, and families, with respect to local educational agencies within the State that are identified under section 6316 of this title and that request assistance with addressing major factors that have significantly affected the academic achievement of students in the local educational agency or schools served by such agency.

(10) Use of academic assessment results to improve student academic achievement

Each State plan shall describe how the State educational agency will ensure that the results of the State assessments described in paragraph (3)--

(A) will be promptly provided to local educational agencies, schools, and teachers in a manner that is clear and easy to understand, but not later than before the beginning of the next school year; and

(B) be used by those local educational agencies, schools, and teachers to improve the educational achievement of individual students.

(c) Other provisions to support teaching and learning

Each State plan shall contain assurances that--

(1) the State educational agency will meet the

requirements of subsection (h)(1) and, beginning with the 2002-2003 school year, will produce the annual State report cards described in such subsection, except that the Secretary may provide the State educational agency 1 additional year if the State educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period;

(2) the State will, beginning in school year 2002-2003, participate in biennial State academic assessments of 4th and 8th grade reading and mathematics under the National Assessment of Educational Progress carried out under section 9622(b)(2) of this title if the Secretary pays the costs of administering such assessments;

(3) the State educational agency, in consultation with the Governor, will include, as a component of the State plan, a plan to carry out the responsibilities of the State under sections 6316 and 6317 of this title, including carrying out the State educational agency's statewide system of technical assistance and support for local educational agencies;

(4) the State educational agency will work with other agencies, including educational service agencies or other local consortia, and institutions to provide technical assistance to local educational agencies and schools, including technical assistance in providing professional development under section 6319 of this

title, technical assistance under section 6317 of this title, and technical assistance relating to parental involvement under section 6318 of this title;

(5) (A) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and

(B) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;

(6) the State educational agency will notify local educational agencies and the public of the content and student academic achievement standards and academic assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 6316 of this title, including such corrective actions as are necessary;

(7) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;

(8) the State educational agency will inform the Secretary and the public of how Federal laws, if at all, hinder the ability of States to hold local

educational agencies and schools accountable for student academic achievement;

(9) the State educational agency will encourage schools to consolidate funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 6314 of this title;

(10) the State educational agency will modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources for schoolwide programs under section 6314 of this title;

(11) the State educational agency has involved the committee of practitioners established under section 6573(b) of this title in developing the plan and monitoring its implementation;

(12) the State educational agency will inform local educational agencies in the State of the local educational agency's authority to transfer funds under subchapter VI of this chapter, to obtain waivers under part D of subchapter IX of this chapter, and, if the State is an Ed-Flex Partnership State, to obtain waivers under the Education Flexibility Partnership Act of 1999;

(13) the State educational agency will coordinate activities funded under this part with other Federal activities as appropriate; and

(14) the State educational agency will encourage local educational agencies and individual schools participating in a program assisted under this part to offer family literacy services (using funds under this part), if the agency or school determines that a

substantial number of students served under this part by the agency or school have parents who do not have a secondary school diploma or its recognized equivalent or who have low levels of literacy.

(d) Parental involvement

Each State plan shall describe how the State educational agency will support the collection and dissemination to local educational agencies and schools of effective parental involvement practices. Such practices shall--

(1) be based on the most current research that meets the highest professional and technical standards, on effective parental involvement that fosters achievement to high standards for all children; and

(2) be geared toward lowering barriers to greater participation by parents in school planning, review, and improvement experienced.

(e) Peer review and secretarial approval

(1) Secretarial duties

The Secretary shall--

(A)establish a peer-review process to assist in the review of State plans;

(B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;

(C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;

(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reasons for such determination;

(E) not decline to approve a State's plan before--

(i) offering the State an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c) of this section; and

(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

(2) State revisions

A State plan shall be revised by the State educational agency if it is necessary to satisfy the requirements of this section.

Appendix K

(f) Duration of the plan

(1) In general

Each State plan shall--

(A) remain in effect for the duration of the State's participation under this part; and

(B) be periodically reviewed and revised as necessary by the State educational agency to reflect changes in the State's strategies and programs under this part.

(2) Additional information

If significant changes are made to a State's plan, such as the adoption of new State academic content standards and State student achievement standards, new academic assessments, or a new definition of adequate yearly progress, such information shall be submitted to the Secretary.

(g) Penalties

(1) Failure to meet deadlines enacted in 1994

(A) In general

If a State fails to meet the deadlines established by the Improving America's Schools Act of 1994 (or under any waiver granted by the Secretary or under any compliance agreement with the Secretary) for demonstrating that the State has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary shall

withhold 25 percent of the funds that would otherwise be available to the State for State administration and activities under this part in each year until the Secretary determines that the State meets those requirements.

(B) No extension

Notwithstanding any other provision of law, 90 days after January 8, 2002, the Secretary shall not grant any additional waivers of, or enter into any additional compliance agreements to extend, the deadlines described in subparagraph (A) for any State.

(2) Failure to meet requirements enacted in 2001

If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

(h) Reports

(1) Annual State report card

(A) In general

Not later than the beginning of the 2002-2003 school year, unless the State has received a 1-year extension pursuant to subsection (c)(1) of this section, a State that receives assistance under this part shall prepare and disseminate an annual State report card.

Appendix K

(B) Implementation

The State report card shall be--

(i) concise; and

(ii) presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(C) Required information

The State shall include in its annual State report card--

(i) information, in the aggregate, on student achievement at each proficiency level on the State academic assessments described in subsection (b)(3) of this section (disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except that such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student);

(ii) information that provides a comparison between the actual achievement levels of each group of students described in subsection (b)(2)(C)(v) of this section and the State's annual measurable objectives for each such group of students on each of the academic assessments required under this part;

(iii) the percentage of students not tested (disaggregated by the same categories and subject to the same exception described in clause (i));

(iv) the most recent 2-year trend in student achievement in each subject area, and for each grade level, for which assessments under this section are required;

(v) aggregate information on any other indicators used by the State to determine the adequate yearly progress of students in achieving State academic achievement standards;

(vi) graduation rates for secondary school students consistent with subsection (b)(2)(C)(vi) of this section;

(vii) information on the performance of local educational agencies in the State regarding making adequate yearly progress, including the number and names of each school identified for school improvement under section 6316 of this title; and

(viii) the professional qualifications of teachers in the State, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the State not taught by highly qualified teachers, in the aggregate and disaggregated by high-poverty compared to low-poverty schools which, for the purpose of this clause, means schools in the top quartile of poverty and the bottom quartile of poverty in the State.

Appendix K

(D)Optional information

The State may include in its annual State report card such other information as the State believes will best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools. Such information may include information regarding--

(i) school attendance rates;

(ii) average class size in each grade;

(iii) academic achievement and gains in English proficiency of limited English proficient students;

(iv) the incidence of school violence, drug abuse, alcohol abuse, student suspensions, and student expulsions;

(v) the extent and type of parental involvement in the schools;

(vi) the percentage of students completing advanced placement courses, and the rate of passing of advanced placement tests; and

(vii) a clear and concise description of the State's accountability system, including a description of the criteria by which the State evaluates school performance, and the criteria that the State has established, consistent with subsection (b)(2) of this section, to determine the status of schools regarding school improvement, corrective action, and restructuring.

Appendix K

(2) Annual local educational agency report cards

(A) Report cards

(i) In general

Not later than the beginning of the 2002-2003 school year, a local educational agency that receives assistance under this part shall prepare and disseminate an annual local educational agency report card, except that the State educational agency may provide the local educational agency 1 additional year if the local educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency, prevented full implementation of this paragraph by that deadline and that the local educational agency will complete implementation within the additional 1-year period.

(ii) Special rule

If a State educational agency has received an extension pursuant to subsection (c)(1) of this section, then a local educational agency within that State shall not be required to include the information required under paragraph (1)(C) in such report card during such extension.

(B) Minimum requirements

The State educational agency shall ensure that each local educational agency collects appropriate data and includes in the local

educational agency's annual report the information described in paragraph (1)(C) as applied to the local educational agency and each school served by the local educational agency, and--

(i) in the case of a local educational agency--

(I) the number and percentage of schools identified for school improvement under section 6316(c) of this title and how long the schools have been so identified; and

(II) information that shows how students served by the local educational agency achieved on the statewide academic assessment compared to students in the State as a whole; and

(ii) in the case of a school--

(I) whether the school has been identified for school improvement; and

(II) information that shows how the school's students achievement on the statewide academic assessments and other indicators of adequate yearly progress compared to students in the local educational agency and the State as a whole.

(C) Other information

A local educational agency may include in its annual local educational agency report card any other appropriate information, whether or not

such information is included in the annual State report card.

(D) Data

A local educational agency or school shall only include in its annual local educational agency report card data that are sufficient to yield statistically reliable information, as determined by the State, and that do not reveal personally identifiable information about an individual student.

(E) Public dissemination

The local educational agency shall, not later than the beginning of the 2002-2003 school year, unless the local educational agency has received a 1-year extension pursuant to subparagraph (A), publicly disseminate the information described in this paragraph to all schools in the school district served by the local educational agency and to all parents of students attending those schools in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand, and make the information widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report.

(3) Preexisting report cards

A State educational agency or local educational agency that was providing public report cards on the performance of students, schools, local educational agencies, or the State prior to January 8, 2002, may use those report cards for the purpose of this subsection, so long as any such report card is modified, as may be needed, to contain the information required by this subsection.

(4) Annual State report to the Secretary

Each State educational agency receiving assistance under this part shall report annually to the Secretary, and make widely available within the State--

(A) beginning with school year 2002-2003, information on the State's progress in developing and implementing the academic assessments described in subsection (b)(3) of this section;

(B) beginning not later than school year 2002-2003, information on the achievement of students on the academic assessments required by subsection (b)(3) of this section, including the disaggregated results for the categories of students identified in subsection (b)(2)(C)(v) of this section;

(C) in any year before the State begins to provide the information described in subparagraph (B), information on the results of student academic assessments (including disaggregated results) required under this section;

(D) beginning not later than school year 2002-2003, unless the State has received an extension pursuant to subsection (c)(1) of this section, information on the acquisition of English proficiency by children with limited English proficiency;

(E) the number and names of each school identified for school improvement under section 6316(c) of this title, the reason why each school was so identified, and the measures taken to address the achievement problems of such schools;

(F) the number of students and schools that participated in public school choice and supplemental service programs and activities under this subchapter; and

(G) beginning not later than the 2002-2003 school year, information on the quality of teachers and the percentage of classes being taught by highly qualified teachers in the State, local educational agency, and school.

(5) Report to Congress

The Secretary shall transmit annually to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report that provides national and State-level data on the information collected under paragraph (4).

Appendix K

(6) Parents right-to-know

(A) Qualifications

At the beginning of each school year, a local educational agency that receives funds under this part shall notify the parents of each student attending any school receiving funds under this part that the parents may request, and the agency will provide the parents on request (and in a timely manner), information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree.

(iv) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

(B) Additional information

In addition to the information that parents may request under subparagraph (A), a school that

receives funds under this part shall provide to each individual parent--

(i) information on the level of achievement of the parent's child in each of the State academic assessments as required under this part; and

(ii) timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who is not highly qualified.

(C) Format

The notice and information provided to parents under this paragraph shall be in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(i) Privacy

Information collected under this section shall be collected and disseminated in a manner that protects the privacy of individuals.

(j) Technical assistance

The Secretary shall provide a State educational agency, at the State educational agency's request, technical assistance in meeting the requirements of this section, including the provision of advice by experts in the development of high- quality academic assessments, the setting of State standards, the development of measures of adequate yearly progress that are valid and reliable, and other relevant areas.

Appendix K

(k) Voluntary partnerships

A State may enter into a voluntary partnership with another State to develop and implement the academic assessments and standards required under this section.

(l) Construction

Nothing in this part shall be construed to prescribe the use of the academic assessments described in this part for student promotion or graduation purposes.

(m) Special rule with respect to Bureau-funded schools

In determining the assessments to be used by each operated or funded by BIA school receiving funds under this part, the following shall apply:

(1) Each such school that is accredited by the State in which it is operating shall use the assessments the State has developed and implemented to meet the requirements of this section, or such other appropriate assessment as approved by the Secretary of the Interior.

(2) Each such school that is accredited by a regional accrediting organization shall adopt an appropriate assessment, in consultation with and with the approval of, the Secretary of the Interior and consistent with assessments adopted by other schools in the same State or region, that meets the requirements of this section.

(3) Each such school that is accredited by a tribal accrediting agency or tribal division of education

shall use an assessment developed by such agency or division, except that the Secretary of the Interior shall ensure that such assessment meets the requirements of this section.

Appendix K

20 U.S.C. § 6316

§ 6316. Academic assessment and local educational agency and school improvement

* * *

(b) School improvement

(1) General requirements

(A) Identification

Subject to subparagraph (C), a local educational agency shall identify for school improvement any elementary school or secondary school served under this part that fails, for 2 consecutive years, to make adequate yearly progress as defined in the State's plan under section 6311(b)(2) of this title.

(B) Deadline

The identification described in subparagraph (A) shall take place before the beginning of the school year following such failure to make adequate yearly progress.

(C) Application

Subparagraph (A) shall not apply to a school if almost every student in each group specified in section 6311(b)(2)(C)(v) of this title enrolled in such school is meeting or exceeding the State's proficient level of academic achievement.

(D) Targeted assistance schools

To determine if an elementary school or a secondary school that is conducting a targeted

assistance program under section 6315 of this title should be identified for school improvement, corrective action, or restructuring under this section, a local educational agency may choose to review the progress of only the students in the school who are served, or are eligible for services, under this part.

(E) Public school choice

(i) In general

In the case of a school identified for school improvement under this paragraph, the local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law.

(ii) Rule

In providing students the option to transfer to another public school, the local educational agency shall give priority to the lowest achieving children from low-income families, as determined by the local educational agency for purposes of allocating funds to schools under section 6313(c)(1) of this title.

(F) Transfer

Students who use the option to transfer under subparagraph (E) and paragraph (5)(A), (7)(C)(i), or (8)(A)(i) or subsection (c)(10)(C)(vii) of this section shall be enrolled in classes and other activities in the public school to which the students transfer in the same manner as all other children at the public school.

(2) Opportunity to review and present evidence; time limit

(A) Identification

Before identifying an elementary school or a secondary school for school improvement under paragraphs (1) or (5)(A), for corrective action under paragraph (7), or for restructuring under paragraph (8), the local educational agency shall provide the school with an opportunity to review the school-level data, including academic assessment data, on which the proposed identification is based.

(B) Evidence

If the principal of a school proposed for identification under paragraph (1), (5)(A), (7), or (8) believes, or a majority of the parents of the students enrolled in such school believe, that the proposed identification is in error for statistical or other substantive reasons, the principal may provide supporting evidence to the local educational agency, which shall consider that evidence before making a final determination.

(C) Final determination

Not later than 30 days after a local educational agency provides the school with the opportunity to review such school-level data, the local educational agency shall make public a final determination on the status of the school with respect to the identification.

(3) School plan

(A) Revised plan

After the resolution of a review under paragraph (2), each school identified under paragraph (1) for school improvement shall, not later than 3 months after being so identified, develop or revise a school plan, in consultation with parents, school staff, the local educational agency serving the school, and outside experts, for approval by such local educational agency. The school plan shall cover a 2-year period and--

(i) incorporate strategies based on scientifically based research that will strengthen the core academic subjects in the school and address the specific academic issues that caused the school to be identified for school improvement, and may include a strategy for the implementation of a comprehensive school reform model that includes each of the components described in part F;

(ii) adopt policies and practices concerning the school's core academic subjects that have the greatest likelihood of ensuring that all groups of students specified in section 6311(b)(2)(C)(v) of

this title and enrolled in the school will meet the State's proficient level of achievement on the State academic assessment described in section 6311(b)(3) of this title not later than 12 years after the end of the 2001-2002 school year;

(iii) provide an assurance that the school will spend not less than 10 percent of the funds made available to the school under section 6313 of this title for each fiscal year that the school is in school improvement status, for the purpose of providing to the school's teachers and principal high-quality professional development that--

(I) directly addresses the academic achievement problem that caused the school to be identified for school improvement;

(II) meets the requirements for professional development activities under section 6319 of this title; and

(III) is provided in a manner that affords increased opportunity for participating in that professional development;

(iv) specify how the funds described in clause (iii) will be used to remove the school from school improvement status;

(v) establish specific annual, measurable objectives for continuous and substantial progress by each group of students specified in section 6311(b)(2)(C)(v) of this title and enrolled in the school that will ensure that all such groups of students will, in accordance with

adequate yearly progress as defined in section 6311(b)(2) of this title, meet the State's proficient level of achievement on the State academic assessment described in section 6311(b)(3) of this title not later than 12 years after the end of the 2001-2002 school year;

(vi) describe how the school will provide written notice about the identification to parents of each student enrolled in such school, in a format and, to the extent practicable, in a language that the parents can understand;

(vii) specify the responsibilities of the school, the local educational agency, and the State educational agency serving the school under the plan, including the technical assistance to be provided by the local educational agency under paragraph (4) and the local educational agency's responsibilities under section 6321 of this title;

(viii) include strategies to promote effective parental involvement in the school;

(ix) incorporate, as appropriate, activities before school, after school, during the summer, and during any extension of the school year; and

(x) incorporate a teacher mentoring program.

(B) Conditional approval

The local educational agency may condition approval of a school plan under this paragraph on--

(i) inclusion of one or more of the corrective actions specified in paragraph (7)(C)(iv); or

(ii) feedback on the school improvement plan from parents and community leaders.

(C) Plan implementation

Except as provided in subparagraph (D), a school shall implement the school plan (including a revised plan) expeditiously, but not later than the beginning of the next full school year following the identification under paragraph (1).

(D) Plan approved during school year

Notwithstanding subparagraph (C), if a plan is not approved prior to the beginning of a school year, such plan shall be implemented immediately upon approval.

(E) Local educational agency approval

The local educational agency, within 45 days of receiving a school plan, shall--

(i) establish a peer review process to assist with review of the school plan; and

(ii) promptly review the school plan, work with the school as necessary, and approve the school plan if the plan meets the requirements of this paragraph.

(4) Technical assistance

(A) In general

For each school identified for school improvement under paragraph (1), the local educational agency serving the school shall

ensure the provision of technical assistance as the school develops and implements the school plan under paragraph (3) throughout the plan's duration.

(B) Specific assistance

Such technical assistance--

(i) shall include assistance in analyzing data from the assessments required under section 6311(b)(3) of this title, and other examples of student work, to identify and address problems in instruction, and problems if any, in implementing the parental involvement requirements described in section 6318 of this title, the professional development requirements described in section 6319 of this title, and the responsibilities of the school and local educational agency under the school plan, and to identify and address solutions to such problems;

(ii) shall include assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research and that have proven effective in addressing the specific instructional issues that caused the school to be identified for school improvement;

(iii) shall include assistance in analyzing and revising the school's budget so that the school's resources are more effectively allocated to the activities most likely to increase student

academic achievement and to remove the school from school improvement status; and

(iv) may be provided--

(I) by the local educational agency, through mechanisms authorized under section 6317 of this title; or

(II) by the State educational agency, an institution of higher education (that is in full compliance with all the reporting provisions of title II of the Higher Education Act of 1965 [20 U.S.C.A. § 1021 et seq.]), a private not-for-profit organization or for-profit organization, an educational service agency, or another entity with experience in helping schools improve academic achievement.

(C) Scientifically based research

Technical assistance provided under this section by a local educational agency or an entity approved by that agency shall be based on scientifically based research.

(5) Failure to make adequate yearly progress after identification

In the case of any school served under this part that fails to make adequate yearly progress, as set out in the State's plan under section 6311(b)(2) of this title, by the end of the first full school year after identification under paragraph

(1), the local educational agency serving such school--

(A) shall continue to provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency in accordance with subparagraphs (E) and (F);

(B) shall make supplemental educational services available consistent with subsection (e)(1) of this section; and

(C) shall continue to provide technical assistance.

(6) Notice to parents

A local educational agency shall promptly provide to a parent or parents (in an understandable and uniform format and, to the extent practicable, in a language the parents can understand) of each student enrolled in an elementary school or a secondary school identified for school improvement under paragraph (1), for corrective action under paragraph (7), or for restructuring under paragraph (8)--

(A) an explanation of what the identification means, and how the school compares in terms of academic achievement to other elementary schools or secondary schools served by the local educational agency and the State educational agency involved;

(B) the reasons for the identification;

(C) an explanation of what the school identified for school improvement is doing to address the problem of low achievement;

(D) an explanation of what the local educational agency or State educational agency is doing to help the school address the achievement problem;

(E) an explanation of how the parents can become involved in addressing the academic issues that caused the school to be identified for school improvement; and

(F) an explanation of the parents' option to transfer their child to another public school under paragraphs (1)(E), (5)(A), (7)(C)(i), (8)(A)(i), and subsection (c)(10)(C)(vii) of this section (with transportation provided by the agency when required by paragraph (9)) or to obtain supplemental educational services for the child, in accordance with subsection (e) of this section.

(7) Corrective action

(A) In general

In this subsection, the term "corrective action" means action, consistent with State law, that--

(i) substantially and directly responds to--

(I) the consistent academic failure of a school that caused the local educational agency to take such action; and

(II) any underlying staffing, curriculum, or other problems in the school; and

(ii) is designed to increase substantially the likelihood that each group of students described in 6311(b)(2)(C) of this title enrolled in the school identified for corrective action will meet or exceed the State's proficient levels of achievement on the State academic assessments described in section 6311(b)(3) of this title.

(B) System

In order to help students served under this part meet challenging State student academic achievement standards, each local educational agency shall implement a system of corrective action in accordance with subparagraphs (C) through (E).

(C) Role of local educational agency

In the case of any school served by a local educational agency under this part that fails to make adequate yearly progress, as defined by the State under section 6311(b)(2) of this title, by the end of the second full school year after the identification under paragraph (1), the local educational agency shall--

(i) continue to provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, in accordance with paragraph (1)(E) and (F);

(ii) continue to provide technical assistance consistent with paragraph (4) while instituting any corrective action under clause (iv);

(iii) continue to make supplemental educational services available, in accordance with subsection (e) of this section, to children who remain in the school; and

(iv) identify the school for corrective action and take at least one of the following corrective actions:

(I) Replace the school staff who are relevant to the failure to make adequate yearly progress.

(II) Institute and fully implement a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress.

(III) Significantly decrease management authority at the school level.

(IV) Appoint an outside expert to advise the school on its progress toward making adequate yearly progress, based on its school plan under paragraph (3).

(V) Extend the school year or school day for the school.

(VI) Restructure the internal organizational structure of the school.

Appendix K

(D) Delay

Notwithstanding any other provision of this paragraph, the local educational agency may delay, for a period not to exceed 1 year, implementation of the requirements under paragraph (5), corrective action under this paragraph, or restructuring under paragraph (8) if the school makes adequate yearly progress for 1 year or if its failure to make adequate yearly progress is due to exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency or school. No such period shall be taken into account in determining the number of consecutive years of failure to make adequate yearly progress.

(E) Publication and dissemination

The local educational agency shall publish and disseminate information regarding any corrective action the local educational agency takes under this paragraph at a school--

(i) to the public and to the parents of each student enrolled in the school subject to corrective action;

(ii) in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand; and

(iii) through such means as the Internet, the media, and public agencies.

Appendix K

(8) Restructuring

(A) Failure to make adequate yearly progress

If, after 1 full school year of corrective action under paragraph (7), a school subject to such corrective action continues to fail to make adequate yearly progress, then the local educational agency shall--

(i) continue to provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, in accordance with paragraph (1)(E) and (F);

(ii) continue to make supplemental educational services available, in accordance with subsection (e) of this section, to children who remain in the school; and

(iii) prepare a plan and make necessary arrangements to carry out subparagraph (B).

(B) Alternative governance

Not later than the beginning of the school year following the year in which the local educational agency implements subparagraph (A), the local educational agency shall implement one of the following alternative governance arrangements for the school consistent with State law:

(i) Reopening the school as a public charter school.

(ii) Replacing all or most of the school staff (which may include the principal) who are

relevant to the failure to make adequate yearly progress.

(iii) Entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school.

(iv) Turning the operation of the school over to the State educational agency, if permitted under State law and agreed to by the State.

(v) Any other major restructuring of the school's governance arrangement that makes fundamental reforms, such as significant changes in the school's staffing and governance, to improve student academic achievement in the school and that has substantial promise of enabling the school to make adequate yearly progress as defined in the State plan under section 6311(b)(2) of this title. In the case of a rural local educational agency with a total of less than 600 students in average daily attendance at the schools that are served by the agency and all of whose schools have a School Locale Code of 7 or 8, as determined by the Secretary, the Secretary shall, at such agency's request, provide technical assistance to such agency for the purpose of implementing this clause.

(C) Prompt notice

The local educational agency shall--

(i) provide prompt notice to teachers and parents whenever subparagraph (A) or (B) applies; and

(ii) provide the teachers and parents with an adequate opportunity to--

(I) comment before taking any action under those subparagraphs; and

(II) participate in developing any plan under subparagraph (A)(iii).

(9) Transportation

In any case described in paragraph (1)(E) for schools described in paragraphs (1)(A), (5), (7)(C)(i), and (8)(A), and subsection (c)(10)(C)(vii) of this section, the local educational agency shall provide, or shall pay for the provision of, transportation for the student to the public school the student attends.

(10) Funds for transportation and supplemental educational services

(A) In general

Unless a lesser amount is needed to comply with paragraph (9) and to satisfy all requests for supplemental educational services under subsection (e) of this section, a local educational agency shall spend an amount equal to 20 percent of its allocation under subpart 2 of this part, from which the agency shall spend--

(i) an amount equal to 5 percent of its allocation under subpart 2 of this part to provide, or pay for, transportation under paragraph (9);

(ii) an amount equal to 5 percent of its allocation under subpart 2 of this part to provide

supplemental educational services under subsection (e) of this section; and

(iii) an amount equal to the remaining 10 percent of its allocation under subpart 2 of this part for transportation under paragraph (9), supplemental educational services under subsection (e) of this section, or both, as the agency determines.

(B) Total amount

The total amount described in subparagraph (A)(ii) is the maximum amount the local educational agency shall be required to spend under this part on supplemental educational services described in subsection (e) of this section.

(C) Insufficient funds

If the amount of funds described in subparagraph (A)(ii) or (iii) and available to provide services under this subsection is insufficient to provide supplemental educational services to each child whose parents request the services, the local educational agency shall give priority to providing the services to the lowest-achieving children.

(D) Prohibition

A local educational agency shall not, as a result of the application of this paragraph, reduce by more than 15 percent the total amount made available under section 6313(c) of this title to a

school described in paragraph (7)(C) or (8)(A) of subsection (b) of this section.

(11) Cooperative agreement

In any case described in paragraph (1)(E), (5)(A), (7)(C)(i), or (8)(A)(i), or subsection (c)(10)(C)(vii) of this section if all public schools served by the local educational agency to which a child may transfer are identified for school improvement, corrective action or restructuring, the agency shall, to the extent practicable, establish a cooperative agreement with other local educational agencies in the area for a transfer.

(12) Duration

If any school identified for school improvement, corrective action, or restructuring makes adequate yearly progress for two consecutive school years, the local educational agency shall no longer subject the school to the requirements of school improvement, corrective action, or restructuring or identify the school for school improvement for the succeeding school year.

(13) Special rule

A local educational agency shall permit a child who transferred to another school under this subsection to remain in that school until the child has completed the highest grade in that school. The obligation of the local educational agency to provide, or to provide for, transportation for the child ends at the end of a school year if the local educational agency

determines that the school from which the child transferred is no longer identified for school improvement or subject to corrective action or restructuring.

(14) State educational agency responsibilities

The State educational agency shall--

(A) make technical assistance under section 6317 of this title available to schools identified for school improvement, corrective action, or restructuring under this subsection consistent with section 6317(a)(2) of this title;

(B) if the State educational agency determines that a local educational agency failed to carry out its responsibilities under this subsection, take such corrective actions as the State educational agency determines to be appropriate and in compliance with State law;

(C) ensure that academic assessment results under this part are provided to schools before any identification of a school may take place under this subsection; and

(D) for local educational agencies or schools identified for improvement under this subsection, notify the Secretary of major factors that were brought to the attention of the State educational agency under section 6311(b)(9) of this title that have significantly affected student academic achievement.

* * *

Appendix K

20 U.S.C. § 6811

§ 6811. Short Title

This part may be cited as the "English Language Acquisition, Language Enhancement, and Academic Achievement Act".

Appendix K

20 U.S.C. § 6812

§ 6812. Purposes

The purposes of this part are--

(1) to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet;

(2) to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet, consistent with section 6311(b)(1) of this title;

(3) to develop high-quality language instruction educational programs designed to assist State educational agencies, local educational agencies, and schools in teaching limited English proficient children and serving immigrant children and youth;

(4) to assist State educational agencies and local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare limited English proficient children, including immigrant children and youth, to enter all-English instruction settings;

(5) to assist State educational agencies, local educational agencies, and schools to build their

capacity to establish, implement, and sustain language instruction educational programs and programs of English language development for limited English proficient children;

(6) to promote parental and community participation in language instruction educational programs for the parents and communities of limited English proficient children;

(7) to streamline language instruction educational programs into a program carried out through formula grants to State educational agencies and local educational agencies to help limited English proficient children, including immigrant children and youth, develop proficiency in English, while meeting challenging State academic content and student academic achievement standards;

(8) to hold State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring--

(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and

(B) adequate yearly progress for limited English proficient children, including immigrant children and youth, as described in section 6311(b)(2)(B) of this title; and

(9) to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational

programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English.

Appendix K

20 U.S.C. § 6841

§ 6841. Evaluations

(a) In general

Each eligible entity that receives a subgrant from a State educational agency under subpart 1 of this part shall provide such agency, at the conclusion of every second fiscal year during which the subgrant is received, with an evaluation, in a form prescribed by the agency, that includes--

(1) a description of the programs and activities conducted by the entity with funds received under subpart 1 of this part during the two immediately preceding fiscal years;

(2) a description of the progress made by children in learning the English language and meeting challenging State academic content and student academic achievement standards;

(3) the number and percentage of children in the programs and activities attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency; and

(4) a description of the progress made by children in meeting challenging State academic content and student academic achievement standards for each of the 2 years after such children are no longer receiving services under this part.

Appendix K

(b) Use of evaluation

An evaluation provided by an eligible entity under subsection (a) of this section shall be used by the entity and the State educational agency--

(1) for improvement of programs and activities;

(2) to determine the effectiveness of programs and activities in assisting children who are limited English proficient to attain English proficiency (as measured consistent with subsection (d)) of this section and meet challenging State academic content and student academic achievement standards; and

(3) in determining whether or not to continue funding for specific programs or activities.

(c) Evaluation components

An evaluation provided by an eligible entity under subsection (a) of this section shall--

(1) provide an evaluation of children enrolled in a program or activity conducted by the entity using funds under subpart 1 of this part (including the percentage of children) who--

(A) are making progress in attaining English proficiency, including the percentage of children who have achieved English proficiency;

(B) have transitioned into classrooms not tailored to limited English proficient children, and have a sufficient level of English proficiency to permit them to achieve in English and transition into classrooms not tailored to limited English proficient children;

(C) are meeting the same challenging State academic content and student academic achievement standards as all children are expected to meet; and

(D) are not receiving waivers for the reading or language arts assessments under section 6311(b)(3)(C) of this title; and

(2) include such other information as the State educational agency may require.

(d) Evaluation measures

A State shall approve evaluation measures for use under subsection (c) of this section that are designed to assess--

(1) the progress of children in attaining English proficiency, including a child's level of comprehension, speaking, listening, reading, and writing skills in English;

(2) student attainment of challenging State student academic achievement standards on assessments described in section 6311(b)(3) of this title; and

(3) progress in meeting the annual measurable achievement objectives described in section 6842 of this title.

(e) Special rule for specially qualified agencies

Each specially qualified agency receiving a grant under this part shall provide the evaluations described in subsection (a) of this section to the Secretary subject to the same

requirements as apply to eligible entities providing such evaluations to State educational agencies under such subsection.

Appendix K

20 U.S.C. § 6842

§ 6842. Achievement objectives and accountability

(a) Achievement objectives

(1) In general

Each State educational agency or specially qualified agency receiving a grant under subpart 1 of this part shall develop annual measurable achievement objectives for limited English proficient children served under this part that relate to such children's development and attainment of English proficiency while meeting challenging State academic content and student academic achievement standards as required by section 6311(b)(1) of this title.

(2) Development of objectives

Such annual measurable achievement objectives shall be developed in a manner that--

(A) reflects the amount of time an individual child has been enrolled in a language instruction educational program; and

(B) uses consistent methods and measurements to reflect the increases described in subparagraphs (A)(i), (A)(ii), and (B) of paragraph (3).

(3) Contents

Such annual measurable achievement objectives--

(A) shall include--

(i) at a minimum, annual increases in the

number or percentage of children making progress in learning English;

(ii) at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency consistent with section 6311(b)(7) of this title; and

(iii) making adequate yearly progress for limited English proficient children as described in section 6311(b)(2)(B) of this title; and

(B) at the discretion of the agency, may include the number or percentage of children not receiving waivers for reading or language arts assessments under section 6311(b)(3)(C) of this title, but this achievement objective shall not be applied to an eligible entity that, in a given school year--

(i) has experienced a large increase in limited English proficient children or immigrant children and youth;

(ii) enrolls a statistically significant number of immigrant children and youth from countries where such children and youth had little or no access to formal education; or

(iii) has a statistically significant number of immigrant children and youth who have fled from war or natural disaster.

Appendix K

(b) Accountability

(1) For States

Each State educational agency receiving a grant under subpart 1 of this part shall hold eligible entities receiving a subgrant under such subpart accountable for meeting the annual measurable achievement objectives under subsection (a) of this section, including making adequate yearly progress for limited English proficient children.

(2) Improvement plan

If a State educational agency determines, based on the annual measurable achievement objectives described in subsection (a) of this section, that an eligible entity has failed to make progress toward meeting such objectives for 2 consecutive years, the agency shall require the entity to develop an improvement plan that will ensure that the entity meets such objectives. The improvement plan shall specifically address the factors that prevented the entity from achieving such objectives.

(3) Technical assistance

During the development of the improvement plan described in paragraph (2), and throughout its implementation, the State educational agency shall--

(A) provide technical assistance to the eligible entity;

(B) provide technical assistance, if applicable, to

schools served by such entity under subpart 1 of this part that need assistance to enable the schools to meet the annual measurable achievement objectives described in subsection (a) of this section;

(C) develop, in consultation with the entity, professional development strategies and activities, based on scientifically based research, that the agency will use to meet such objectives;

(D) require such entity to utilize such strategies and activities; and

(E) develop, in consultation with the entity, a plan to incorporate strategies and methodologies, based on scientifically based research, to improve the specific program or method of instruction provided to limited English proficient children.

(4) Accountability

If a State educational agency determines that an eligible entity has failed to meet the annual measurable achievement objectives described in subsection (a) of this section for 4 consecutive years, the agency shall--

(A) require such entity to modify the entity's curriculum, program, and method of instruction; or

(B) (i) make a determination whether the entity shall continue to receive funds related to the entity's failure to meet such objectives; and

(ii) require such entity to replace educational

personnel relevant to the entity's failure to meet such objectives.

(c) Special rule for specially qualified agencies

The Secretary shall hold specially qualified agencies receiving a grant under this subpart accountable for meeting the annual measurable achievement objectives described in subsection (a) of this section in the same manner as State educational agencies hold eligible entities accountable under subsection (b) of this section.

Appendix L

Arizona House Bill 2064

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 15-241, Arizona Revised Statutes, is amended to read:

15-241. School accountability; schools failing to meet academic standards; failing schools tutoring fund

A. The department of education shall compile an annual achievement profile for each public school.

B. Each school shall submit to the department any data that is required and requested and that is necessary to compile the achievement profile. A school that fails to submit the information that is necessary is not eligible to received monies from the classroom site fund established by section 15-977.

C. The department shall establish a baseline achievement profile for each school by October 15, 2001. The baseline achievement profiles shall be used to determine a standard measurement of acceptable academic progress for each school and a school classification pursuant to subsection G of this section. Any disclosure of educational records compiled by the department of education pursuant to this section shall comply with the family educational and privacy rights act of 1974 (20 United States Code section 1232g).

D. The achievement profile for schools that offer instruction in kindergarten programs and grades one through eight, or any combination of those programs or grades, shall include the following school academic performance indicators:

1. The Arizona measure of academic progress. The department shall compute the extent of academic progress made by the pupils in each school during the course of each year.

2. The Arizona instrument to measure standards test. The department shall compute the percentage of pupils who meet or exceed the standard on the Arizona instrument to measure standards test, as prescribed by the state board of education.

3. THE RESULTS OF ENGLISH LANGUAGE LEARNERS TESTS ADMINISTERED PURSUANT TO SECTION 15-756, SUBSECTION B, SECTION 15-756.05 AND SECTION 15-756.06.

E. The achievement profile for schools that offer instruction in grades nine through twelve, or any combination of those grades, shall include the following school academic performance indicators:

1. The Arizona instrument to measure standards test. The department shall compute the percentage of pupils pursuant to subsection F of this section who meet or exceed the standard on the Arizona instrument to measure standards test, as prescribed by the state board of education.

2. The annual dropout rate.

3. The annual graduation rate.

4. THE RESULTS OF ENGLISH LANGUAGE LEARNERS TESTS ADMINISTERED PURSUANT TO SECTION 15-756, SUBSECTION B, SECTION 15-756.05 AND SECTION 15-756.06.

F. Subject to final adoption by the state board of education, the department shall determine the criteria for each school classification using a research based methodology. The methodology shall include the performance of pupils at all achievement levels, account for pupil mobility, account for the distribution of pupil achievement at each school and include longitudinal indicators of academic performance. For the purposes of this subsection, "research based methodology" means the systematic and objective application of statistical and quantitative research principles to determine a standard measurement of acceptable academic progress for each school.

G. The achievement profile shall be used to determine a school classification that designates each school as one of the following:

1. An excelling school.

2. A highly performing school.

3. A performing school.

4. An underperforming school.

5. A school failing to meet academic standards.

Appendix L

H. The classification for each school and the criteria used to determine classification pursuant to subsection F of this section shall be included on the school report card prescribed in section 15-746.

I. Subject to final adoption by the state board of education, the department of education shall develop a parallel achievement profile for accommodation schools, alternative schools as defined by the state board of education and schools with a student count of fewer than one hundred pupils.

J. If a school is designated as an underperforming school, within ninety days after receiving notice of the designation, the governing board shall develop an improvement plan for the school, submit a copy of the plan to the superintendent of public instruction and supervise the implementation of the plan. The plan shall include necessary components as identified by the state board of education. Within thirty days after submitting the improvement plan to the superintendent of public instruction, the governing board shall hold a special public meeting in each school that has been designated as an underperforming school and shall present the respective improvement plans that have been developed for each school. The school district governing board, within thirty days of receiving notice of the designation, shall provide written notification of the classification to each residence within the attendance area of the school. The notice shall explain the improvement plan process and

provide information regarding the public meeting required by this subsection.

K. A school that has not submitted an improvement plan pursuant to subsection J of this section is not eligible to receive monies from the classroom site fund established by section 15-977 for every day that a plan has not been received by the superintendent of public instruction within the time specified in subsection J of this section plus an additional ninety days. The state board of education shall require the superintendent of the school district to testify before the board and explain the reasons that an improvement plan for that school has not been submitted.

L. If a charter school is designated as an underperforming school, within thirty days the school shall notify the parents of the students attending the school of the classification. The notice shall explain the improvement plan process and provide information regarding the public meeting required by this subsection. Within ninety days of receiving the classification, the charter holder shall present an improvement plan to the charter sponsor at a public meeting and submit a copy of the plan to the superintendent of public instruction. The improvement plan shall include necessary components as identified by the state board of education. For every day that an improvement plan is not received by the superintendent of public instruction, the school is not eligible to receive monies from the classroom site fund established by section 15-977 for ninety days plus every day that a

plan is not received. The charter holder shall appear before the sponsoring board and explain why the improvement plan has not been submitted.

M. The department of education shall establish an appeals process, to be approved by the state board of education, for a school to appeal data used to determine the achievement profile of the school. The criteria established shall be based on mitigating factors and may include a visit to the school site by the department of education.

N. If a school remains classified as an underperforming school for a third consecutive year, the department of education shall visit the school site to confirm the classification data and to review the implementation of the school's improvement plan. The school shall be classified as failing to meet academic standards unless an alternate classification is made after an appeal pursuant to subsection M of this section.

O. The school district governing board, within thirty days of receiving notice of the school failing to meet academic standards classification, shall provide written notification of the classification to each residence in the attendance area of the school. The notice shall explain the improvement plan process and provide information regarding the public meeting required by subsection R of this section.

P. The superintendent of public instruction, based on need, shall assign a solutions team to an underperforming school or a school failing

to meet academic standards comprised of master teachers, fiscal analysts and curriculum assessment experts who are certified by the state board of education as Arizona academic standards technicians. The department of education may hire or contract with administrators, principals and teachers who have demonstrated experience with the characteristics and situations in an underperforming school or a school failing to meet academic standards and may use these personnel as part of the solutions team. The team shall work with staff at the school to assist in curricula alignment and shall instruct teachers on how to increase pupil academic progress, considering the school 's achievement profile. The team shall select two master teachers to be employed by the school. The solutions team shall consider the existing improvement plan to assess the need for changes to curriculum, professional development and resource allocation.

Q. The parent or the guardian of the pupil may apply to the department of education, in a manner determined by the department of education, for a certificate of supplemental instruction from the failing schools tutoring fund established by this section. Pupils attending a school designated as an underperforming school or a school failing to meet academic standards or a pupil who has failed to pass one or more portions of the Arizona instrument to measure standards test in order to graduate from high school may select an alternative tutoring program in academic standards from a provider that is certified by the state board of education. To qualify, the provider must guarantee in writing a

stated level of academic improvement for the pupil that includes a timeline for improvement that is agreed to by the parent or guardian of the pupil and the provider shall agree to refund to the state the standards assistance grant monies if the guaranteed level of academic improvement is not met. The state board of education shall determine the application guidelines and the maximum value for each certificate of supplemental instruction. The state board of education shall annually complete a market survey in order to determine the maximum value for each certificate of supplemental instruction. Nothing in this subsection shall be construed to require the state to provide additional monies beyond the monies provided pursuant to section 42-5029, subsection E, paragraph 7.

R. Within sixty days of receiving notification of designation as a school failing to meet academic standards, the school district governing board shall evaluate needed changes to the existing improvement plan for the school, consider recommendations from the solutions team, submit a copy of the plan to the superintendent of public instruction and supervise the implementation of the plan. Within thirty days after submitting the improvement plan to the superintendent of public instruction, the governing board shall hold a public meeting in each school that has been designated as a school failing to meet academic standards and shall present the respective improvement plans that have been developed for each school.

Appendix L

S. A school that has not submitted an improvement plan pursuant to subsection R of this section is not eligible to receive monies from the classroom site fund established by section 15-977 for every day that a plan has not been received by the superintendent of public instruction within the time specified in subsection R of this section plus an additional ninety days. The state board of education shall require the superintendent of the school district to testify before the board and explain the reasons that an improvement plan for that school has not been submitted.

T. If a charter school is designated as a school failing to meet academic standards, the department of education shall immediately notify the charter school's sponsor. The charter school's sponsor shall either take action to restore the charter school to acceptable performance or revoke the charter school's charter. Within thirty days the school shall notify the parents of the students attending the school of the classification and of any pending public meetings to review the issue.

U. A school that has been designated as a school failing to meet academic standards shall be evaluated by the department of education to determine if the school failed to properly implement its school improvement plan, the alignment of the curriculum with academic standards, teacher training, budget prioritization or other proven strategies to improve academic performance. After visiting the school site pursuant to subsection N of this section, the department of education shall

submit to the state board of education a recommendation to proceed pursuant to subsections P, Q and R of this section or that the school be subject to a public hearing to determine if the school failed to properly implement its improvement plan and the reasons for the department's recommendation.

V. If the department does recommend a public hearing, the state board of education shall meet and may provide by a majority vote at the public hearing for the continued operation of the school as allowed by this subsection. The state board of education shall determine whether governmental, nonprofit and private organizations may submit applications to the state board to fully or partially manage the school. The state board's determination shall include:

1. If and to what extent the local governing board may participate in the operation of the school including personnel matters.

2. If and to what extent the state board of education shall participate in the operation of the school.

3. Resource allocation pursuant to subsection X of this section.

4. Provisions for the development and submittal of a school improvement plan to be presented in a public meeting at the school.

5. A suggested time frame for the alternative operation of the school.

Appendix L

W. The state board shall periodically review the status of a school that is operated by an organization other than the school district governing board to determine whether the operation of the school should be returned to the school district governing board. Before the state board makes a determination, the state board or its designee shall meet with the school district governing board or its designee to determine the time frame, operational considerations and the appropriate continuation of existing improvements that are necessary to assure a smooth transition of authority from the other organization back to the school district governing board.

X. If an alternative operation plan is provided pursuant to subsection V of this section, the state board of education shall pay for the operation of the school and shall adjust the school district's student count pursuant to section 15-902, soft capital allocation pursuant to section 15-962, capital outlay revenue limit pursuant to section 15-961, base support level pursuant to section 15-943, monies distributed from the classroom site fund established ~~in~~ BY section 15-977 and transportation support level pursuant to section 15-945 to accurately reflect any reduction in district services that are no longer provided to that school by the district. The state board of education may modify the school district's revenue control limit, the district support level and the general budget limit calculated pursuant to section 15-945 by an amount that corresponds to this reduction in services. The state board of education shall retain the portion of state aid that would

otherwise be due the school district for the school and shall distribute that portion of state aid directly to the organization that contracts with the state board of education to operate the school.

Y. If the state board of education determines that a charter school failed to properly implement its improvement plan, the sponsor of the charter school shall revoke the charter school's charter.

Z. If there are more than two schools in a district and more than one-half, or in any case more than five, of the schools in the district are designated as schools failing to meet academic standards for more than two consecutive years, in the next election of members of the governing board the election ballot shall contain the following statement immediately above the listing of governing board candidates.

> Within the last five years, (number of schools) schools in the _____ school district have been designated as "schools failing to meet academic standards" by the superintendent of public instruction.

AA. At least twice each year the department of education shall publish in a newspaper of general circulation in each county of this state a list of schools that are designated as schools failing to meet academic standards.

BB. The failing schools tutoring fund is established consisting of monies collected pursuant to section 42-5029, subsection E as designated for

this purpose. The department of education shall administer the fund.

Sec. 2. Repeal

Section 15-756, Arizona Revised Statutes, is repealed.

Sec. 3. Renumber

Section 15-756.01, Arizona Revised Statutes, is renumbered as section 15-757.

Sec. 4. Title 15, chapter 7, article 3.1, Arizona Revised Statues, is amended by adding new sections 15-756 and 15-756.01 and sections 15-756.02 through 15-756.13, to read:

15-756. Identification of English language learners

A. THE PRIMARY OR HOME LANGUAGE FOR ALL NEW PUPILS WHO ENROLL IN A SCHOOL DISTRICT OR CHARTER SCHOOL SHALL BE IDENTIFIED IN A MANNER PRESCRIBED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

B. THE ENGLISH LANGUAGE PROFICIENCY OF ALL PUPILS WITH A PRIMARY OR HOME LANGUAGE OTHER THAN ENGLISH SHALL BE ASSESSED THROUGH THE ADMINISTRATION OF ENGLISH LANGUAGE PROFICIENCY ASSESSMENTS IN A MANNER PRESCRIBED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION. THE TEST SCORES ADOPTED BY THE SUPERINTENDENT AS INDICATING ENGLISH LANGUAGE

PROFICIENCY SHALL BE BASED ON THE TEST PUBLISHERS' DESIGNATED SCORES. THE DEPARTMENT SHALL ANNUALLY REQUEST AN APPROPRIATION TO PAY FOR THE PURCHASE OF ALL LANGUAGE PROFICIENCY ASSESSMENTS, SCORING AND ANCILLARY MATERIALS AS PRESCRIBED BY THE DEPARTMENT FOR SCHOOL DISTRICTS AND CHARTER SCHOOLS.

C. IF IT IS DETERMINED THAT A PUPIL IS NOT ENGLISH LANGUAGE PROFICIENT, THE PUPIL SHALL BE CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER AND SHALL BE ENROLLED IN AN ENGLISH LANGUAGE EDUCATION PROGRAM PURSUANT TO SECTION 15-752 OR 15-753.

15-756.01 Arizona English language learners task force; research based models of structured English immersion for English language learners; budget requests; definitions

A. THE ARIZONA ENGLISH LANGUAGE LEARNERS TASK FORCE IS ESTABLISHED IN THE DEPARTMENT OF EDUCATION. THE TASK FORCE SHALL CONSIST OF:

1. THREE MEMBERS APPOINTED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

2. TWO MEMBERS WHO ARE APPOINTED BY THE GOVERNOR.

3. TWO MEMBERS WHO ARE APPOINTED BY THE PRESIDENT OF THE SENATE.

4. TWO MEMBERS WHO ARE APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

B. MEMBERS OF THE TASK FORCE SHALL SERVE FOUR YEAR TERMS. MEMBERS OF THE TASK FORCE SHALL ELECT A CHAIRPERSON FROM AMONG THE MEMBERS OF THE TASK FORCE. THE DEPARTMENT OF EDUCATION SHALL PROVIDE ADEQUATE STAFF SUPPORT FOR THE TASK FORCE.

C. BY SEPTEMBER 1, 2006, THE TASK FORCE SHALL DEVELOP AND ADOPT RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION PROGRAMS FOR USE BY SCHOOL DISTRICTS AND CHARTER SCHOOLS. THE MODELS SHALL TAKE INTO CONSIDERATION AT LEAST THE SIZE OF THE SCHOOL, THE LOCATION OF THE SCHOOL, THE GRADE LEVELS AT THE SCHOOL, THE NUMBER OF ENGLISH LANGUAGE LEARNERS AND THE PERCENTAGE OF ENGLISH LANGUAGE LEARNERS. THE MODELS SHALL BE LIMITED TO PROGRAMS FOR ENGLISH LANGUAGE LEARNERS TO PARTICIPATE IN A STRUCTURED ENGLISH IMMERSION PROGRAM NOT NORMALLY INTENDED TO EXCEED ONE YEAR. THE TASK FORCE SHALL IDENTIFY THE MINIMUM AMOUNT OF ENGLISH LANGUAGE DEVELOPMENT PER DAY FOR ALL MODELS.

THE TASK FORCE SHALL DEVELOP SEPARATE MODELS FOR THE FIRST YEAR IN WHICH A PUPIL IS CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER THAT INCLUDES A MINIMUM OF FOUR HOURS PER DAY OF ENGLISH LANGUAGE DEVELOPMENT.

D. THE RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION ADOPTED BY THE TASK FORCE SHALL BE THE MOST COST-EFFICIENT MODELS THAT MEET ALL STATE AND FEDERAL LAWS.

E. THE RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION SHALL BE LIMITED TO A REGULAR SCHOOL YEAR AND SCHOOL DAY. INSTRUCTION OUTSIDE THE REGULAR SCHOOL YEAR OR SCHOOL DAY SHALL BE PROVIDED WITH COMPENSATORY INSTRUCTION AND MAY BE ELIGIBLE FOR FUNDING FROM THE STATEWIDE COMPENSATORY INSTRUCTION FUND ESTABLISHED BY SECTION 15-756.11.

F. THE RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION SHALL BE SUBMITTED BY THE TASK FORCE TO THE PRESIDENT OF THE SENATE, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, THE GOVERNOR AND THE STATE BOARD OF EDUCATION. AT LEAST THIRTY DAYS BEFORE ADOPTION, THE TASK FORCE SHALL SUBMIT THE RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION TO THE

JOINT LEGISLATIVE BUDGET COMMITTEE FOR REVIEW.

G. THE TASK FORCE SHALL REVIEW RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION ANNUALLY AND DELETE, ADD OR MODIFY THE EXISTING MODELS. WHEN ADOPTING OR MODIFYING ENGLISH LANGUAGE LEARNER PROGRAMS, THE TASK FORCE SHALL REVIEW AND CONSIDER THE INFORMATION AND DATA OBTAINED AS A RESULT OF THE DEPARTMENT OF EDUCATION'S MONITORING OF ENGLISH LANGUAGE LEARNER PROGRAMS PURSUANT TO SECTION 15-756.08.

H. THE TASK FORCE SHALL ESTABLISH PROCEDURES FOR SCHOOL DISTRICTS AND CHARTER SCHOOLS TO DETERMINE THE INCREMENTAL COSTS FOR IMPLEMENTATION OF THE RESEARCH BASED MODELS OF STRUCTURED ENGLISH IMMERSION DEVELOPED BY THE TASK FORCE.

I. THE TASK FORCE SHALL ESTABLISH A FORM FOR SCHOOL DISTRICTS AND CHARTER SCHOOLS TO DETERMINE THE STRUCTURED ENGLISH IMMERSION BUDGET REQUEST AMOUNT. NOTWITHSTANDING ANY OTHER LAW, THE MAXIMUM AMOUNT OF THE BUDGET REQUEST SHALL BE THE INCREMENTAL COSTS OF THE MODEL SELECTED OFFSET BY THE FOLLOWING MONIES:

Appendix L

1. ALL FEDERAL TITLE III MONIES AND ANY OTHER FEDERAL MONIES DESIGNATED SOLELY FOR THE EDUCATIONAL NEEDS OF ENGLISH LANGUAGE LEARNERS.

2. THE PORTION OF TITLE I AND TITLE II A MONIES DETERMINED BY THE ENGLISH LANGUAGE LEARNER POPULATION AS A PERCENTAGE OF THE QUALIFIED POPULATION.

3. THE PORTION OF IMPACT AID MONIES DETERMINED BY THE ENGLISH LANGUAGE LEARNER POPULATION AS A PERCENTAGE OF THE QUALIFIED POPULATION. A SCHOOL DISTRICT OR CHARTER SCHOOL SHALL ONLY APPLY UNEXPENDED IMPACT AID MONIES TO ENGLISH LANGUAGE LEARNER PROGRAMS AFTER IT HAS APPLIED ITS IMPACT AID MONIES FOR OTHER ALLOWABLE USES AS PERMITTED BY STATE LAW.

4. THE PORTION OF DESEGREGATION MONIES LEVIED PURSUANT TO SECTION 15-910 DETERMINED BY THE ENGLISH LANGUAGE LEARNER POPULATION AS A PERCENTAGE OF THE QUALIFIED POPULATION.

5. THE ELL SUPPORT LEVEL WEIGHT PRESCRIBED IN SECTION 15-943.

J. THE DIFFERENCE CALCULATED PURSUANT TO SUBSECTION I OF THIS SECTION SHALL BE THE MAXIMUM AMOUNT

Appendix L

OF THE STRUCTURED ENGLISH IMMERSION BUDGET REQUEST PURSUANT TO SECTION 15-756.03 FOR MONIES FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04. BEGINNING JULY 15, 2008, SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL NOT INCLUDE THE INCREMENTAL COSTS OF ANY PUPIL WHO IS CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER AFTER JULY 1, 2007 AND WHO HAS BEEN CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER FOR MORE THAN TWO YEARS IN THE CALCULATION OF THE SCHOOL DISTRICT'S OR CHARTER SCHOOL'S STRUCTURED ENGLISH IMMERSION BUDGET REQUEST.

K. IN CONSULTATION WITH THE AUDITOR GENERAL, THE DEPARTMENT OF EDUCATION SHALL DEVELOP AND ADOPT FORMS TO BE USED BY SCHOOL DISTRICTS AND CHARTER SCHOOLS TO SUBMIT BUDGET REQUESTS FOR THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND, INCLUDING THE FORM PRESCRIBED IN SUBSECTION I OF THIS SECTION.

L. FOR THE PURPOSES OF THIS SECTION:

1. "COMPENSATORY INSTRUCTION" HAS THE SAME MEANING PRESCRIBED IN SECTION 15-756.11.

2. "INCREMENTAL COSTS" MEANS COSTS THAT ARE ASSOCIATED WITH A STRUCTURED ENGLISH IMMERSION PROGRAM PURSUANT TO SECTION 15-752 OR A PROGRAM PURSUANT TO SECTION 15-753 AND THAT ARE IN ADDITION TO THE NORMAL COSTS OF CONDUCTING PROGRAMS FOR ENGLISH PROFICIENT STUDENTS. INCREMENTAL COSTS DO NOT INCLUDE COSTS THAT REPLACE THE SAME TYPES OF SERVICES PROVIDED TO ENGLISH PROFICIENT STUDENTS OR COMPENSATORY INSTRUCTION.

15-756.02. School districts and charter schools; English language learner models; adoption and implementation

A. EACH SCHOOL DISTRICT GOVERNING BOARD AND EACH GOVERNING BODY OF A CHARTER SCHOOL SHALL SELECT ONE OR MORE OF THE TASK FORCE APPROVED MODELS FOR STRUCTURED ENGLISH IMMERSION FOR IMPLEMENTATION ON A SCHOOL BY SCHOOL BASIS.

B. IF A SCHOOL DISTRICT OR CHARTER SCHOOL WANTS TO ADOPT AN ENGLISH LANGUAGE LEARNER PROGRAM THAT IS NOT BASED ON A MODEL ADOPTED BY THE TASK FORCE, THE SCHOOL DISTRICT OR CHARTER SCHOOL SHALL FIRST SUBMIT THE PROPOSED PROGRAM ALONG WITH SUPPORTING DOCUMENTATION REGARDING THE EXPECTED OUTCOMES OF THE PROGRAM ON THE DISTRICT'S OR CHARTER SCHOOL'S

ENGLISH LANGUAGE LEARNER STUDENTS TO THE TASK FORCE FOR APPROVAL.

C. ON RECEIPT OF A PROPOSED PROGRAM FROM A SCHOOL DISTRICT OR CHARTER SCHOOL, THE TASK FORCE MAY DO ONE OF THE FOLLOWING:

1. APPROVE THE PROPOSED PROGRAM.

2. PROVIDE LIMITED APPROVAL SUBJECT TO SPECIFIC STIPULATIONS PRESCRIBED BY THE STATE BOARD.

3. REJECT THE PROPOSED PROGRAM AND IDENTIFY A MODEL APPROVED BY THE TASK FORCE FOR THE SCHOOL DISTRICT OR CHARTER SCHOOL TO ADOPT.

D. SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL INCLUDE A COPY OF THE ADOPTED ENGLISH LANGUAGE LEARNER PROGRAM IN THE ANNUAL REPORT REQUIRED IN SECTION 15-756.10.

15-756.03. Structured English immersion; budget request

A. IF A SCHOOL DISTRICT OR CHARTER SCHOOL QUALIFIES TO SUBMIT A BUDGET REQUEST BASED ON THE FORM PRESCRIBED IN SECTION 15-756.01, SUBSECTION I, THE SCHOOL DISTRICT OR CHARTER SCHOOL SHALL SUBMIT A STRUCTURED ENGLISH IMMERSION BUDGET REQUEST ON A SCHOOL BY SCHOOL BASIS.

Appendix L

THE BUDGET REQUEST SHALL BE FOR A SPECIFIC AMOUNT OF SUPPLEMENTAL MONIES FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04.

B. EACH SCHOOL DISTRICT OR CHARTER SCHOOL STRUCTURED ENGLISH IMMERSION BUDGET REQUEST SHALL INCLUDE THE SIGNATURE OF THE SUPERINTENDENT OF THE SCHOOL DISTRICT AND THE CHIEF FINANCIAL OFFICER OF THE SCHOOL DISTRICT OR THE PRINCIPAL OF THE CHARTER SCHOOL AND THE CHIEF FINANCIAL OFFICER OF THE CHARTER SCHOOL THAT CERTIFIES THAT THE INFORMATION IN THE BUDGET REQUEST IS TRUE TO THE BEST OF THAT PERSON'S KNOWLEDGE AND HAS BEEN CALCULATED IN ACCORDANCE WITH THE FORM PRESCRIBED IN SECTION 15-756.01, SUBSECTION I AND THAT MONIES FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04 WILL NOT BE USED TO SUPPLANT ANY FEDERAL, STATE OR LOCAL MONIES, INCLUDING DESEGREGATION MONIES LEVIED PURSUANT TO SECTION 15-910, USED FOR ENGLISH LANGUAGE LEARNERS THAT WERE BUDGETED FOR ENGLISH LANGUAGE LEARNERS AS OF FEBRUARY 23, 2006.

C. BEGINNING JULY 1, 2007, EACH SCHOOL DISTRICT AND CHARTER SCHOOL

THAT SUBMITS A STRUCTURED ENGLISH IMMERSION BUDGET REQUEST SHALL SUBMIT THE BUDGET REQUEST TO THE DEPARTMENT OF EDUCATION ANNUALLY ON OR BEFORE SEPTEMBER 15. THE DEPARTMENT OF EDUCATION SHALL VERIFY THE BUDGET REQUEST OF EACH SCHOOL DISTRICT AND CHARTER SCHOOL FOR ACCURACY AND COMPLIANCE WITH THE FORM PRESCRIBED IN SECTION 15-756.01, SUBSECTION I. THE DEPARTMENT SHALL COLLECT ALL SCHOOL DISTRICT AND CHARTER SCHOOL BUDGET REQUESTS AND SUBMIT THEM TO THE LEGISLATURE FOR FUNDING FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04 AT THE SAME TIME AS THE DEPARTMENT'S BUDGET REQUEST.

15-756.04. Arizona structured English immersion fund

A. THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND IS ESTABLISHED. THE DEPARTMENT OF EDUCATION SHALL ADMINISTER THE FUND.

B. THE DEPARTMENT SHALL SUBMIT AN ANNUAL REQUEST FOR AN APPROPRIATION FOR THE PURPOSES OF THIS SECTION.

C. IN ADDITION TO THE ELL SUPPORT LEVEL WEIGHT PRESCRIBED IN SECTION 15-943, THE DEPARTMENT SHALL DISTRIBUTE

MONIES FROM THE FUND TO SCHOOL DISTRICTS AND CHARTER SCHOOLS IN AN AMOUNT SPECIFIED IN THE BUDGET REQUEST PRESCRIBED IN SECTION 15-756.03, SUBSECTION C. MONIES FROM THE FUND ESTABLISHED BY THIS SECTION AND MONIES FOR THE ELL SUPPORT LEVEL WEIGHT PRESCRIBED IN SECTION 15-943 SHALL NOT BE DISTRIBUTED FOR MORE THAN TWO FISCAL YEARS FOR THE SAME PUPIL. NOTHING IN THIS SUBSECTION SHALL BE CONSTRUED TO PROHIBIT A SCHOOL DISTRICT OR CHARTER SCHOOL FROM RECEIVING MONIES FROM THE STATEWIDE COMPENSATORY INSTRUCTION FUND ESTABLISHED BY SECTION 15-756.11 FOR MORE THAN TWO FISCAL YEARS FOR THE SAME PUPIL.

D. THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL ATTEMPT TO OBTAIN THE MAXIMUM AMOUNT OF FEDERAL FUNDING THAT IS AVAILABLE FOR ENGLISH LANGUAGE LEARNER PROGRAMS.

E. EACH SCHOOL DISTRICT AND CHARTER SCHOOL SHALL ESTABLISH A LOCAL LEVEL STRUCTURED ENGLISH IMMERSION FUND TO RECEIVE MONIES DISTRIBUTED FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND. MONIES IN LOCAL LEVEL STRUCTURED ENGLISH IMMERSION FUNDS SHALL BE SPENT ONLY TO PROVIDE INSTRUCTION TO ENGLISH LANGUAGE

LEARNERS. THE AUDITOR GENERAL SHALL MODIFY THE BUDGET FORMAT, FINANCIAL RECORD REQUIREMENTS, ACCOUNTING FORMS AND FINANCIAL REPORT FORMS IN ACCORDANCE WITH THIS SUBSECTION. IN CONSULTATION WITH THE DEPARTMENT OF EDUCATION, THE AUDITOR GENERAL SHALL PROVIDE SUPPORT AND GUIDANCE TO ASSIST SCHOOL DISTRICTS AND CHARTER SCHOOLS IN COMPLYING WITH THIS SUBSECTION. DOCUMENTS DEVELOPED PURSUANT TO THIS SUBSECTION SHALL BE REVIEWED BY THE ARIZONA ENGLISH LANGUAGE LEARNERS TASK FORCE ESTABLISHED BY SECTION 15-756.01 AND THE JOINT LEGISLATIVE BUDGET COMMITTEE.

F. SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL USE MONIES FROM THE FUND TO SUPPLEMENT EXISTING PROGRAMS FOR ENGLISH LANGUAGE LEARNERS. MONIES FROM THE FUND SHALL NOT BE USED TO SUPPLANT AVAILABLE MONIES USED TO PAY FOR THE NORMAL COSTS OF CONDUCTING PROGRAMS FOR ENGLISH PROFICIENT STUDENTS.

15-756.05. Reassessment and reclassification of English language learners

A. THE PROCESS OF REASSESSMENT OF ENGLISH LANGUAGE LEARNERS FOR THE PURPOSE OF DETERMINING ENGLISH LANGUAGE PROFICIENCY SHALL BE CONDUCTED AT LEAST ANNUALLY AT THE

END OF EACH SCHOOL YEAR IN A MANNER PRESCRIBED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

B. A PUPIL WHO SCORES AT OR ABOVE THE TEST PUBLISHER'S DESIGNATED SCORE FOR ENGLISH PROFICIENCY SHALL BE CONSIDERED ENGLISH PROFICIENT. THE PUPIL SHALL NO LONGER BE CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER AND SHALL BE RECLASSIFIED AS ENGLISH PROFICIENT.

C. A PUPIL WHO HAS ATTAINED ENGLISH PROFICIENCY PURSUANT TO THIS SECTION SHALL BE TRANSFERRED TO ENGLISH LANGUAGE MAINSTREAM CLASSROOMS.

15-756.06. Reevaluation of former English language learners

A. THE ENGLISH LANGUAGE PROFICIENCY OF EACH PUPIL PREVIOUSLY CLASSIFIED AS AN ENGLISH LANGUAGE LEARNER WITHIN THE LAST TWO YEARS SHALL BE TESTED ANNUALLY AT THE END OF EACH SCHOOL YEAR, IN THE SAME MANNER AS PROVIDED IN SECTION 15-756, SUBSECTION B. THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL PRESCRIBE THE MANNER IN WHICH PUPILS ARE REEVALUATED. PUPILS WHO FAIL TO DEMONSTRATE ENGLISH PROFICIENCY ON THE REASSESSMENT TEST IN THE TWO YEARS

FOLLOWING THEIR EXIT FROM STRUCTURED ENGLISH IMMERSION, SUBJECT TO PARENTAL CONSENT, SHALL BE REENROLLED IN STRUCTURED ENGLISH IMMERSION PURSUANT TO SECTION 15-752 AND MAY BE PROVIDED COMPENSATORY INSTRUCTION AS DEFINED IN SECTION 15-756.11.

15-756.07. Office of English language acquisition services; duties

THE OFFICE OF ENGLISH LANGUAGE ACQUISITION SERVICES IS ESTABLISHED IN THE DEPARTMENT OF EDUCATION. THE DEPARTMENT OF EDUCATION, OFFICE OF ENGLISH LANGUAGE ACQUISITION SERVICES, SHALL:

1. DEVELOP GUIDELINES FOR MONITORING SCHOOL DISTRICTS AND CHARTER SCHOOLS TO ENSURE COMPLIANCE WITH ALL FEDERAL AND STATE LAWS REGARDING ENGLISH LANGUAGE LEARNERS.

2. IN CONSULTATION WITH COUNTY SCHOOL SUPERINTENDENTS, DEVELOP REGIONAL PROGRAMS TO ENHANCE ALL ASPECTS OF TRAINING FOR TEACHERS AND ADMINISTRATORS.

3. PUBLISH ENGLISH LANGUAGE LEARNER POLICY GUIDELINES FOR SCHOOL DISTRICTS AND CHARTER SCHOOLS THAT INCLUDE A LIST OF RELEVANT RULES, REGULATIONS AND STATUTES RELATING TO ENGLISH LANGUAGE LEARNER PROGRAMS TO

NOTIFY SCHOOL DISTRICTS AND CHARTER SCHOOLS OF THEIR RESPONSIBILITIES.

4. PROVIDE TECHNICAL ASSISTANCE TO SCHOOL DISTRICTS AND CHARTER SCHOOLS TO IMPLEMENT STRUCTURED ENGLISH IMMERSION PROGRAMS.

15-756.08. Monitoring; corrective action plan

A. THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL DIRECT THE OFFICE OF ENGLISH LANGUAGE ACQUISITION SERVICES IN THE DEPARTMENT OF EDUCATION TO:

1. MONITOR EACH YEAR AT LEAST TWELVE SCHOOL DISTRICTS OR CHARTER SCHOOLS FROM THE FIFTY SCHOOL DISTRICTS OR CHARTER SCHOOLS IN THIS STATE WITH THE HIGHEST NUMBER OF ENGLISH LANGUAGE LEARNERS. THE DEPARTMENT OF EDUCATION SHALL MONITOR ALL FIFTY SCHOOL DISTRICTS OR CHARTER SCHOOLS WITH THE HIGHEST NUMBER OF ENGLISH LANGUAGE LEARNERS IN THIS STATE AT LEAST ONCE EVERY FOUR YEARS.

2. MONITOR EACH YEAR AT LEAST TEN SCHOOL DISTRICTS OR CHARTER SCHOOLS THAT ARE NOT INCLUDED IN THE FIFTY SCHOOL DISTRICTS OR CHARTER SCHOOLS DESCRIBED IN PARAGRAPH 1.

3. MONITOR EACH YEAR AT LEAST TEN SCHOOL DISTRICTS OR CHARTER SCHOOLS THAT ARE NOT REQUIRED TO

PROVIDE INSTRUCTION FOR ENGLISH LANGUAGE LEARNERS FOR A MAJORITY OF THEIR GRADE LEVELS.

4. CHOOSE, BASED ON THE DEPARTMENT'S REVIEW OF REPORTS SUBMITTED BY SCHOOL DISTRICTS AND CHARTER SCHOOLS, THE SCHOOL DISTRICTS AND CHARTER SCHOOLS DESCRIBED IN PARAGRAPHS 1, 2 AND 3.

5. SELECT A RANDOM SAMPLE OF THREE HUNDRED ENGLISH LANGUAGE LEARNERS EACH MONTH TO DETERMINE:

(a) HOW MANY OF THE SAMPLE CAN READ THE RANDOMLY ORDERED ALPHABET IN THIRTY SECONDS OR LESS.

(b) HOW MANY OF THE SAMPLE CAN READ A RANDOMLY SORTED LIST OF THIRTY SINGLE-SYLLABLE WORDS IN ONE MINUTE OR LESS.

B. THE MONITORING REQUIRED BY THIS SECTION SHALL BE ON-SITE MONITORING AND SHALL INCLUDE CLASSROOM OBSERVATIONS, CURRICULUM REVIEWS, FACULTY INTERVIEWS, STUDENT RECORDS, A REVIEW OF ENGLISH LANGUAGE LEARNER PROGRAMS AND AN ANALYSIS OF PROGRAMMATIC EFFECTIVENESS, AT A MINIMUM, TO INCLUDE PRIOR YEAR DATA THAT ANALYZE THE PROGRESS OF ENGLISH LANGUAGE LEARNERS.

C. BASED ON THE RESULTS OF THE MONITORING, THE DEPARTMENT SHALL DETERMINE WHETHER OR NOT THE SCHOOL DISTRICT OR CHARTER SCHOOL IS COMPLYING WITH STATE AND FEDERAL LAWS APPLICABLE TO ENGLISH LANGUAGE LEARNERS.

D. THE DEPARTMENT SHALL ISSUE A REPORT OF THE RESULTS OF THE MONITORING WITHIN FORTY-FIVE DAYS AFTER COMPLETING THE MONITORING.

E. WITHIN SIXTY DAYS FOLLOWING THE ISSUANCE OF THE DEPARTMENT'S REPORT, THE SCHOOL DISTRICT OR CHARTER SCHOOL RECEIVING THE REPORT SHALL PREPARE AND SUBMIT TO THE DEPARTMENT A CORRECTIVE ACTION PLAN, IN A MANNER PRESCRIBED BY THE STATE BOARD OF EDUCATION, THAT SETS FORTH STEPS THAT WILL BE TAKEN TO CORRECT THE DEFICIENCIES, IF ANY, NOTED IN THE DEPARTMENT'S REPORT.

F. WITHIN THIRTY DAYS AFTER RECEIVING A SCHOOL DISTRICT'S OR CHARTER SCHOOL'S CORRECTIVE ACTION PLAN, THE DEPARTMENT SHALL REVIEW THE CORRECTIVE ACTION PLAN AND MAY REQUIRE CHANGES TO THE CORRECTIVE ACTION PLAN.

G. AFTER THE DEPARTMENT HAS REVIEWED A SCHOOL DISTRICT'S OR

CHARTER SCHOOL'S CORRECTIVE ACTION PLAN AND MADE ANY CHANGES THE DEPARTMENT DEEMS NECESSARY, THE DEPARTMENT SHALL RETURN THE CORRECTIVE ACTION PLAN TO THE SCHOOL DISTRICT OR CHARTER SCHOOL.

H. WITHIN THIRTY DAYS AFTER RECEIVING A CORRECTIVE ACTION PLAN BACK FROM THE DEPARTMENT, THE SCHOOL DISTRICT OR CHARTER SCHOOL SHALL BEGIN IMPLEMENTING THE MEASURES SET FORTH IN THE CORRECTIVE ACTION PLAN.

I. THE DEPARTMENT SHALL CONDUCT A FOLLOW-UP EVALUATION OF THE SCHOOL DISTRICT OR CHARTER SCHOOL WITHIN ONE YEAR AFTER THE DEPARTMENT RETURNED THE CORRECTIVE ACTION PLAN TO THE SCHOOL DISTRICT OR CHARTER SCHOOL.

J. IN CONDUCTING THE FOLLOW-UP EVALUATION, IF THE DEPARTMENT FINDS THAT THE SCHOOL DISTRICT OR CHARTER SCHOOL IS NOT IN COMPLIANCE WITH STATE AND FEDERAL LAWS APPLICABLE TO ENGLISH LANGUAGE LEARNERS, THE DEPARTMENT SHALL REFER THE SCHOOL DISTRICT OR CHARTER SCHOOL TO THE STATE BOARD OF EDUCATION FOR A FINDING OF NONCOMPLIANCE. A SCHOOL DISTRICT OR CHARTER SCHOOL FOUND BY THE BOARD TO BE NONCOMPLIANT SHALL NOT CONTINUE TO RECEIVE ANY MONIES FROM THE ARIZONA

Appendix L

STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04 FOR ENGLISH LANGUAGE LEARNERS AND SHALL NOT REDUCE THE AMOUNT OF MONIES SPENT ON THE SCHOOL DISTRICT'S OR CHARTER SCHOOL'S ENGLISH LANGUAGE LEARNER PROGRAMS DESPITE THE LOSS OF MONIES CAUSED BY THE NONCOMPLIANCE.

K. THE DEPARTMENT SHALL MONITOR EACH SCHOOL DISTRICT OR CHARTER SCHOOL THAT THE STATE BOARD OF EDUCATION HAS FOUND TO BE NONCOMPLIANT AND THAT IS NOT RECEIVING ARIZONA STRUCTURED ENGLISH IMMERSION FUND MONIES PURSUANT TO SUBSECTION J OF THIS SECTION TO ENSURE THAT THE SCHOOL DISTRICT OR CHARTER SCHOOL DOES NOT REDUCE THE AMOUNT OF MONIES SPENT ON THE SCHOOL DISTRICT'S OR CHARTER SCHOOL'S ENGLISH LANGUAGE LEARNER PROGRAMS DESPITE THE LOSS OF ARIZONA STRUCTURED ENGLISH IMMERSION FUND MONIES CAUSED BY THE NONCOMPLIANCE.

15-756.09. Teacher training

A. THE STATE BOARD OF EDUCATION SHALL DETERMINE THE QUALIFICATIONS NECESSARY FOR A PROVISIONAL AND FULL STRUCTURED ENGLISH IMMERSION ENDORSEMENT.

Appendix L

B. TRAINING MAY BE ALLOWED THAT IS NOT PROVIDED BY A COLLEGE OR UNIVERSITY TO SUBSTITUTE FOR ANY OF THE COURSES REQUIRED FOR A STRUCTURED ENGLISH IMMERSION ENDORSEMENT OR A BILINGUAL EDUCATION ENDORSEMENT IF ALL OF THE FOLLOWING CONDITIONS APPLY:

1. THE STATE BOARD OF EDUCATION HAS REVIEWED THE CURRICULA, TEXTBOOKS, GRADING PROCEDURES AND ATTENDANCE POLICIES AND DETERMINED THAT THE TRAINING IS COMPARABLE IN AMOUNT, SCOPE AND QUALITY TO A COURSE OFFERED BY A COLLEGE OR UNIVERSITY FOR A STRUCTURED ENGLISH IMMERSION OR BILINGUAL EDUCATION ENDORSEMENT.

2. THE TRAINING MEETS THE PROFESSIONAL TEACHING STANDARDS ADOPTED BY THE STATE BOARD OF EDUCATION.

3. THE STATE BOARD OF EDUCATION HAS REVIEWED THE QUALIFICATIONS OF THE INSTRUCTOR AND DETERMINED THAT THE INSTRUCTOR HAS SUFFICIENT EXPERIENCE TO EFFECTIVELY CONDUCT THE TRAINING.

C. THE STATE BOARD OF EDUCATION SHALL REQUIRE ALL APPROVED TEACHER TRAINING PROGRAMS THAT PROVIDE A DEGREE IN EDUCATION TO REQUIRE COURSES THAT ARE NECESSARY TO OBTAIN A

Appendix L

FULL STRUCTURED ENGLISH IMMERSION ENDORSEMENT.

15-756.10. Reporting

THE OFFICE OF ENGLISH LANGUAGE ACQUISITION SERVICES IN THE DEPARTMENT OF EDUCATION SHALL:

1. REQUIRE EACH SCHOOL DISTRICT AND CHARTER SCHOOL TO ANNUALLY SUBMIT A REPORT TO THE DEPARTMENT OF EDUCATION THAT INCLUDES THE FOLLOWING INFORMATION IDENTIFIED BY GRADE LEVEL AND BY SCHOOL:

(a) THE TOTAL NUMBER OF PUPILS WHO ARE CLASSIFIED AS ENGLISH LANGUAGE LEARNERS AS VERIFIED BY THE STUDENT ACCOUNTABILITY INFORMATION SYSTEM ESTABLISHED BY SECTION 15-1041.

(b) THE NUMBER OF PUPILS WHO ARE CLASSIFIED AS ENGLISH LANGUAGE LEARNERS FOR THE FIRST TIME AS VERIFIED BY THE STUDENT ACCOUNTABILITY INFORMATION SYSTEM ESTABLISHED BY SECTION 15-1041.

(c) THE NUMBER OF ENGLISH LANGUAGE LEARNERS WHO ACHIEVED ENGLISH PROFICIENCY IN THE PAST ACADEMIC YEAR AND WHO HAVE BEEN RECLASSIFIED AS ENGLISH PROFICIENT AS VERIFIED BY THE STUDENT ACCOUNTABILITY INFORMATION SYSTEM ESTABLISHED BY SECTION 15-1041.

(d) THE NUMBER OF PUPILS WHO ARE ENROLLED IN EACH TYPE OF LANGUAGE ACQUISITION PROGRAM OFFERED BY THE SCHOOL DISTRICT OR CHARTER SCHOOL AS VERIFIED BY THE STUDENT ACCOUNTABILITY INFORMATION SYSTEM ESTABLISHED BY SECTION 15-1041.

(e) IF REQUESTED BY THE DEPARTMENT OF EDUCATION, THE TEST DATA USED TO DETERMINE ENGLISH PROFICIENCY.

2. DETERMINE THE MOBILITY OF ENGLISH LANGUAGE LEARNERS WITHIN THE SAME SCHOOL DISTRICT AND THE MOBILITY OF ENGLISH LANGUAGE LEARNERS TO OTHER SCHOOL DISTRICTS AND CHARTER SCHOOLS THROUGH THE STUDENT ACCOUNTABILITY INFORMATION SYSTEM ESTABLISHED BY SECTION 15-1041.

3. SUBMIT AN ANNUAL REPORT TO THE JOINT LEGISLATIVE BUDGET COMMITTEE THAT INCLUDES AN ITEMIZED LIST OF ALL FEDERAL MONIES RECEIVED BY THE DEPARTMENT FOR ENGLISH LANGUAGE LEARNERS, A LIST OF HOW MUCH OF THESE MONIES WERE DISTRIBUTED TO SCHOOL DISTRICTS ON A DISTRICT BY DISTRICT BASIS AND THE PURPOSES FOR WHICH THESE FEDERAL MONIES ARE DESIGNATED. THE DEPARTMENT SHALL SUBMIT A COPY OF THIS REPORT TO THE SECRETARY OF STATE AND

THE DIRECTOR OF THE ARIZONA STATE LIBRARY, ARCHIVES AND PUBLIC RECORDS.

4. SUBMIT AN ANNUAL REPORT TO THE GOVERNOR, THE PRESIDENT OF THE SENATE, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE STATE BOARD OF EDUCATION THAT INCLUDES A DETAILED ANALYSIS OF WHETHER AND TO WHAT EXTENT PUPILS ARE BENEFITING ACADEMICALLY FROM COMPENSATORY INSTRUCTION AS DEFINED IN SECTION 15-756.11 AND A COMPARISON OF THE ACADEMIC ACHIEVEMENT OF PUPILS BEFORE AND AFTER RECEIVING COMPENSATORY INSTRUCTION AS DEFINED IN SECTION 15-756.11. THE DEPARTMENT SHALL SUBMIT A COPY OF THIS REPORT TO THE SECRETARY OF STATE AND THE DIRECTOR OF THE ARIZONA STATE LIBRARY, ARCHIVES AND PUBLIC RECORDS.

5. PRESENT A DETAILED ANNUAL SUMMARY OF ALL ENGLISH LANGUAGE LEARNER PROGRAMS AND FUNDING AT A PUBLIC MEETING OF THE STATE BOARD OF EDUCATION.

6. PRESENT A SUMMARY OF INFORMATION RELATING TO THE DEMONSTRATED SUCCESS OF SCHOOLS AND SCHOOL DISTRICTS AT ACHIEVING ENGLISH PROFICIENCY FOR ENGLISH LANGUAGE LEARNERS.

Appendix L

15-756.11. Statewide compensatory instruction fund; reporting; definition

A. THE STATEWIDE COMPENSATORY INSTRUCTION FUND IS ESTABLISHED. THE DEPARTMENT OF EDUCATION SHALL ADMINISTER THE FUND.

B. TO BE ELIGIBLE FOR MONIES APPROPRIATED PURSUANT TO THIS SECTION, A SCHOOL DISTRICT OR CHARTER SCHOOL MUST DEMONSTRATE TO THE DEPARTMENT OF EDUCATION THAT IT HAS ESTABLISHED A SATISFACTORY COMPENSATORY INSTRUCTION PROGRAM. THE DEPARTMENT OF EDUCATION SHALL DISTRIBUTE MONIES FROM THE FUND TO SCHOOL DISTRICTS AND CHARTER SCHOOLS IN AN AMOUNT DETERMINED BY THE DEPARTMENT FOR COMPENSATORY INSTRUCTION COSTS.

C. SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL ANNUALLY SUBMIT WRITTEN COMPENSATORY INSTRUCTION BUDGET REQUESTS TO THE DEPARTMENT ON OR BEFORE JULY 15 FOR MONIES FROM THE FUND ON A FORM DEVELOPED BY THE DEPARTMENT. THE REQUESTS SHALL INCLUDE AN ANALYSIS OF COMPENSATORY INSTRUCTION EFFECTIVENESS.

D. THE WRITTEN REQUESTS SUBMITTED BY SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL BE SIGNED BY THE SUPERINTENDENT OF THE SCHOOL DISTRICT

AND THE CHIEF FINANCIAL OFFICER OF THE SCHOOL DISTRICT OR THE PRINCIPAL OF THE CHARTER SCHOOL AND THE CHIEF FINANCIAL OFFICER OF THE CHARTER SCHOOL AND MONIES FROM THE STATEWIDE COMPENSATORY INSTRUCTION FUND SHALL NOT BE USED TO SUPPLANT ANY FEDERAL, STATE OR LOCAL MONIES, INCLUDING DESEGREGATION MONIES LEVIED PURSUANT TO SECTION 15-910, USED FOR ENGLISH LANGUAGE LEARNERS THAT WERE BUDGETED FOR ENGLISH LANGUAGE LEARNERS AS OF FEBRUARY 23, 2006.

E. SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL USE MONIES FROM THE FUND TO SUPPLEMENT EXISTING PROGRAMS. MONIES SHALL NOT BE USED TO SUPPLANT ANY FEDERAL, STATE OR LOCAL MONIES, INCLUDING DESEGREGATION MONIES LEVIED PURSUANT TO SECTION 15-910, USED FOR COMPENSATORY INSTRUCTION THAT WERE BUDGETED FOR ENGLISH LANGUAGE LEARNERS AS OF FEBRUARY 23, 2006.

F. EACH SCHOOL DISTRICT AND CHARTER SCHOOL SHALL ESTABLISH A LOCAL LEVEL COMPENSATORY INSTRUCTION FUND TO RECEIVE MONIES DISTRIBUTED FROM THE STATEWIDE COMPENSATORY INSTRUCTION FUND. MONIES IN LOCAL LEVEL COMPENSATORY INSTRUCTION FUNDS SHALL BE SPENT ONLY FOR COMPENSATORY INSTRUCTION. THE AUDITOR GENERAL

SHALL MODIFY THE BUDGET FORMAT, FINANCIAL RECORD REQUIREMENTS, ACCOUNTING FORMS AND FINANCIAL REPORT FORMS IN ACCORDANCE WITH THIS SUBSECTION. IN CONSULTATION WITH THE DEPARTMENT OF EDUCATION, THE AUDITOR GENERAL SHALL PROVIDE SUPPORT AND GUIDANCE TO ASSIST SCHOOL DISTRICTS AND CHARTER SCHOOLS IN COMPLYING WITH THIS SUBSECTION. DOCUMENTS DEVELOPED PURSUANT TO THIS SUBSECTION SHALL BE REVIEWED BY THE ARIZONA ENGLISH LANGUAGE LEARNERS TASK FORCE ESTABLISHED BY SECTION 15-756.01 AND THE JOINT LEGISLATIVE BUDGET COMMITTEE.

G. FOR THE PURPOSES OF THIS SECTION, "COMPENSATORY INSTRUCTION" MEANS PROGRAMS IN ADDITION TO NORMAL CLASSROOM INSTRUCTION THAT MAY INCLUDE INDIVIDUAL OR SMALL GROUP INSTRUCTION, EXTENDED DAY CLASSES, SUMMER SCHOOL OR INTERSESSION SCHOOL AND THAT ARE LIMITED TO IMPROVING THE ENGLISH PROFICIENCY OF CURRENT ENGLISH LANGUAGE LEARNERS AND PUPILS WHO WERE ENGLISH LANGUAGE LEARNERS AND WHO HAVE BEEN RECLASSIFIED AS ENGLISH PROFICIENT WITHIN THE PREVIOUS TWO YEARS.

15-756.12. Auditor general; duties

THE AUDITOR GENERAL SHALL:

Appendix L

1. MODIFY THE ANNUAL FINANCIAL REPORT PRESCRIBED IN SECTION 15-904 IN ORDER TO CARRY OUT THIS ARTICLE.

2. BIENNIALLY AUDIT THE OVERALL EFFECTIVENESS OF THE ENGLISH LANGUAGE LEARNER PROGRAM BASED ON PERFORMANCE BASED OUTCOME MEASUREMENTS AND INCREASED ENGLISH PROFICIENCY AND REVIEW THE MOBILITY OF ENGLISH PROFICIENT STUDENTS AND ENGLISH LANGUAGE LEARNERS.

3. CONDUCT FINANCIAL AUDITS ON SCHOOL DISTRICTS MONITORED PURSUANT TO SECTION 15-756.08. THE FINANCIAL AUDITS SHALL INCLUDE A REVIEW OF THE STRUCTURED ENGLISH IMMERSION BUDGET REQUESTS SUBMITTED PURSUANT TO SECTIONS 15-756.01 AND 15-756.03 AND OF THE STATEWIDE COMPENSATORY INSTRUCTION BUDGET REQUESTS SUBMITTED PURSUANT TO SECTION 15-756.11. THE AUDITOR GENERAL MAY CONDUCT FINANCIAL AUDITS ON RANDOMLY SELECTED SCHOOL DISTRICTS THAT ARE NOT CURRENTLY MONITORED PURSUANT TO SECTION 15-756.08.

15-756.13. School district and charter schools; responsibility to comply with state and federal law

NOTHING IN SECTIONS 15-756 AND 15-756.01 THROUGH 15-756.12 RELIEVES A SCHOOL DISTRICT OR CHARTER SCHOOL OF

Appendix L

ITS RESPONSIBILITY TO COMPLY WITH ALL STATE AND FEDERAL LAWS.

Sec. 5. Section 15-910, Arizona Revised Statutes, is amended to read:

15-910. School district budgets; excess utility costs; desegregation costs; tuition costs for bond issues; costs for registering warrants; report

A. The governing board may budget for the district's excess utility costs which are specifically exempt from the district's revenue control limit. If approved by the qualified electors voting at a statewide general election, the exemption from the revenue control limit under this subsection expires at the end of the 2008-2009 budget year. The uniform system of financial records shall specify expenditure items allowable as excess utility costs, which are limited to direct operational costs of heating, cooling, water and electricity, telephone communications and sanitation fees. The department of education and the auditor general shall include in the maintenance and operation section of the budget format, as provided in section 15-903, a separate line for utility expenditures and a special excess utility cost category. The special excess utility cost category shall contain budgeted expenditures for excess utility costs, determined as follows:

1. Determine the lesser of the total budgeted or total actual utility expenditures for fiscal year 1984-1985.

2. Multiply the amount in paragraph 1 of this subsection by the total percentage increase or decrease in the revenue control limit and the capital outlay revenue limit for the budget year over the revenue control limit and the capital outlay revenue limit for fiscal year 1984-1985 excluding monies available from a career ladder program or a teacher compensation program provided for in section 15-952.

3. The sum of the amounts in paragraphs 1 and 2 of this subsection is the amount budgeted in the utility expenditure line.

4. Additional expenditures for utilities are budgeted in the excess utility cost category.

B. The governing board shall apply the same percentage increase or decrease allowed in the revenue control limit and the capital outlay revenue limit as provided in section 15-905, subsection E or section 15-948 to the utility expenditure line of the budget.

C. The governing board may expend from the excess utility cost category only after it has expended for utility purposes the full amount budgeted in the utility expenditure line of the budget.

D. The governing board, after notice is given and a public meeting is held as provided in section 15-905, subsection D, may revise at any time before May 15 the amount budgeted in the excess utility cost category for the current year. Not later than May 18, the budget as revised shall be

submitted electronically to the superintendent of public instruction.

E. If the revised excess utility cost category results in an expenditure of monies in excess of school district revenues for the current year, the county school superintendent shall include within the revenue estimate for the budget year monies necessary to meet the liabilities incurred by the school district in the current year in excess of revenues received for the current year.

F. If a school district receives a refund of utility expenditures or a rebate on energy saving devices or services, the refund or rebate shall be applied against utility expenditures for the current year as a reduction of the expenditures, except that the reduction of expenditures shall not exceed the amount of actual utility expenditures.

G. The governing board may budget for expenses of complying with or continuing to implement activities which were required or permitted by a court order of desegregation or administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination which are specifically exempt in whole or in part from the revenue control limit and the capital outlay revenue limit. This exemption applies only to expenses incurred for activities which are begun before the termination of the court order or administrative agreement. IF A DISTRICT IS LEVYING A PRIMARY PROPERTY TAX ON FEBRUARY 23, 2006 AND USING THOSE

Appendix L

MONIES TO ADMINISTER AN ENGLISH LANGUAGE LEARNER PROGRAM TO REMEDY ALLEGED OR PROVEN DISCRIMINATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (42 UNITED STATES CODE SECTION 2000d), THE DISTRICT MAY SPEND THOSE MONIES TO REMEDY A VIOLATION OF THE EQUAL EDUCATION ACT OF 1974 (20 UNITED STATES CODE SECTION 1703(f)). NOTHING IN THIS SUBSECTION ALLOWS A SCHOOL DISTRICT TO LEVY A PRIMARY PROPERTY TAX FOR VIOLATIONS OF THE EQUAL EDUCATION ACT OF 1974 (20 UNITED STATES CODE SECTION 1703(f)) IN THE ABSENCE OF AN ALLEGED OR PROVEN DISCRIMINATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (42 UNITED STATES CODE SECTION 2000d).

H. If a governing board chooses to budget monies outside of the revenue control limit as provided in subsection G of this section, the governing board may do one of the following:

1. Use monies from the maintenance and operation fund equal to any excess desegregation or compliance expenses beyond the revenue control limit before June 30 of the current year.

2. Notify the county school superintendent to include the cost of the excess expenses in the county school superintendent's estimate of the additional amount needed for the school district from the primary property tax as provided in section 15-991.

3. Employ the provisions of both paragraphs 1 and 2 of this subsection provided that the total amount transferred and included in the amount needed from property taxes does not exceed the total amount budgeted as prescribed in subsection J, paragraph 1 of this section.

I. Through fiscal year 2003-2004, the maximum amount which a governing board may budget outside of the capital outlay revenue limit as provided in subsection G of this section is twelve per cent of the maintenance and operation desegregation budget as provided in subsection J of this section or the amount that it budgeted pursuant to this subsection for fiscal year 2001-2002, whichever is less. If a governing board chooses to budget monies outside of the capital outlay revenue limit as provided in subsection G of this section, the governing board may notify the county school superintendent to include the cost of the excess expenses in the county school superintendent's estimate of the additional amount needed for the school district from the primary property tax as provided in section 15-991.

J. A governing board using subsections G, H and I of this section:

1. Shall prepare and employ a separate maintenance and operation desegregation budget and capital outlay desegregation budget on a form prescribed by the superintendent of public instruction in conjunction with the auditor general. The budget format shall be designed to allow a school district to plan and provide in detail for expenditures

to be incurred solely as a result of compliance with or continuing to implement activities which were required or permitted by a court order of desegregation or administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination.

2. Shall prepare as a part of the annual financial report a detailed report of expenditures incurred solely as a result of compliance with or continuing to implement activities which were required or permitted by a court order of desegregation or administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination, in a format prescribed by the auditor general in conjunction with the department of education as provided by section 15-904.

3. On or before July 15, 2006 and each year thereafter, shall collect and report data regarding activities related to a court order of desegregation or an administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination in a format prescribed by the department of education. The department shall compile and submit copies of the reports to the governor, the president of the senate, the speaker of the house of representatives and the chairpersons of the education committees of the senate and the house of representatives. A school district that becomes subject to a new court order of

desegregation or a party to an administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination shall submit these reports on or before July 15 or within ninety days of the date of the court order or administrative agreement, whichever occurs first. The department of education, in consultation with the auditor general, shall develop reporting requirements to ensure that school districts submit at least the following information and documentation to the department of education beginning in fiscal year 2006-2007:

(a) A district-wide budget summary and a budget summary on a school by school basis for each school in the school district that lists the sources and uses of monies that are designated for desegregation purposes.

(b) A detailed list of desegregation activities on a district-wide basis and on a school by school basis for each school in the school district.

(c) The date that the school district was determined to be out of compliance with title VI of the civil rights act of 1964 (42 United States Code section 2000d) and the basis for that determination.

(d) The initial date that the school district began to levy property taxes to provide funding for desegregation expenses and any dates that these property tax levies were increased.

(e) If applicable, a current and accurate description of all magnet type programs

that are in operation pursuant to the court order during the current school year on a district-wide basis and on a school by school basis. This information shall contain the eligibility and attendance criteria of each magnet type program, the capacity of each magnet type program, the ethnic composition goals of each magnet type program, the actual attending ethnic composition of each magnet type program and the specific activities offered in each magnet type program.

(f) The number of pupils who participate in desegregation activities on a district-wide basis and on a school by school basis for each school in the school district.

(g) A detailed summary of the academic achievement of pupils on a district-wide basis and on a school by school basis for each school in the school district.

(h) The number of employees, including teachers and administrative personnel, on a district-wide basis and on a school by school basis for each school in the school district that are necessary to conduct desegregation activities.

(i) The number of employees, including teachers and administrative personnel, on a district-wide basis and on a school by school basis for each school in the school district and the number of employees at school district administrative offices that are funded in whole or in part with desegregation monies received pursuant to this section.

(j) The amount of monies that are not derived through a primary or secondary property tax levy and that are budgeted and spent on desegregation activities on a district-wide basis and on a school by school basis for each school in the school district.

(k) Verification that the desegregation funding will supplement and not supplant funding for other academic and extracurricular activities.

(l) Verification that the desegregation funding is educationally justifiable.

(m) Any documentation that supports the proposition that the requested desegregation funding is intended to result in equal education opportunities for all pupils in the school district.

(n) Verification that the desegregation funding will be used to promote systemic and organizational changes within the school district.

(o) Verification that the desegregation funding will be used in accordance with the academic standards adopted by the state board of education pursuant to sections 15-701 and 15-701.01.

(p) Verification that the desegregation funding will be used to accomplish specific actions to remediate proven discrimination pursuant to title VI of the civil rights act of 1964 (42 United States Code section 2000d) as specified in the court order or administrative agreement.

(q) An evaluation by the school district of the effectiveness of the school district's desegregation measures.

(r) An estimate of when the school district will be in compliance with the court order or administrative agreement and a detailed account of the steps that the school district will take to achieve compliance.

(s) Any other information that the department of education deems necessary to carry out the purposes of this paragraph.

K. If a school district governing board budgets for expenses of complying with a court order of desegregation or an administrative agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination, the governing board shall ensure that the desegregation expenses will:

1. Be educationally justifiable.

2. Result in equal education opportunities for all pupils in the school district.

3. Be used to promote systemic and organizational changes within the school district.

4. Be used in accordance with the academic standards adopted by the state board of education pursuant to sections 15-701 and 15-701.01.

5. Be used to accomplish specific actions to remediate proven discrimination pursuant to title VI of the civil rights act of 1964 (42 United States Code

section 2000d) as specified in the court order or administrative agreement.

6. Be used in accordance with a plan submitted to the department of education that includes an estimate of the amount of monies that will be required to bring the school district into compliance with the court order or administrative agreement and an estimate of when the school district will be in compliance with the court order or administrative agreement.

L. The governing board may budget for the bond issues portion of the cost of tuition charged the district as provided in section 15-824 for the pupils attending school in another school district, except that if the district is a common school district not within a high school district, the district may only include that part of tuition which is excluded from the revenue control limit and district support level as provided in section 15-951. The bond issues portion of the cost of tuition charged is specifically exempt from the revenue control limit of the school district of residence, and the primary property tax rate set to fund this amount shall not be included in the computation of additional state aid for education as provided in section 15-972, except as provided in section 15-972, subsection E. The department of education and the auditor general shall include in the maintenance and operation section of the budget format, as provided in section 15-903, a separate category for the bond issues portion of the cost of tuition.

Appendix L

M. The governing board may budget for interest expenses it incurred for registering warrants drawn against a fund of the school district or net interest expense on tax anticipation notes as prescribed in section 35-465.05, subsection C for the fiscal year preceding the current year if the county treasurer pooled all school district monies for investment as provided in section 15-996 for the fiscal year preceding the current year and, in those school districts that receive state aid, the school districts applied for an apportionment of state aid before the date set for the apportionment as provided in section 15-973 for the fiscal year preceding the current year. The governing board may budget an amount for interest expenses for registering warrants or issuing tax anticipation notes equal to or less than the amount of the warrant interest expense or net interest expense on tax anticipation notes as prescribed in section 35-465.05, subsection C for the fiscal year preceding the current year as provided in this subsection which is specifically exempt from the revenue control limit. For the purposes of this subsection, "state aid" means state aid as determined in sections 15-971 and 15-972.

Sec. 6. Section 15-943, Arizona Revised Statutes, is amended to read:

15-943. Base support level

The base support level for each school district shall be computed as follows:

Appendix L

1. The following support level weights shall be used in paragraph 2, subdivision (a) for the following school districts:

(a) For school districts whose student count in kindergarten programs and grades one through eight is classified in column 1 of this subdivision, the support level weight for kindergarten programs and grades one through eight is the corresponding support level weight prescribed in column 2 or 3 of this subdivision, whichever is appropriate:

Column 1	Column 2	Column 3
Student Count	Support Level Weight For Small Isolated School Districts	Support Level Weight For Small School Districts
1-99	1.559	1.399
100-499	1.358 + [0.0005 x (500 - student count)]	1.278 + [0.0003 x (500 - student count)]
500-599	1.158 + [0.002 x (600 - student count)]	1.158 + [0.0012 x (600 - student count)]

(b) For school districts whose student count in grades nine through twelve is classified in column 1 of this subdivision, the support level weight for grades nine through twelve is the corresponding support level weight prescribed in

column 2 or 3 of this subdivision, whichever is appropriate:

Column 1	Column 2	Column 3
Student Count	Support Level Weight For Small Isolated School Districts	Support Level Weight For Small School Districts
1-99	1.669	1.559
100-499	1.468 + [0.0005 x (500 - student count)]	1.398 + [0.0004 x (500 - student count)]
500-599	1.268 + [0.002 x (600 - student count)]	1.268 + [0.0013 x (600 - student count)]

2. Subject to paragraph 1, determine the weighted student count as follows, EXCEPT THAT FUNDING FOR THE SAME ELL PUPIL SHALL NOT BE PROVIDED FOR MORE THAN TWO FISCAL YEARS:

(a)

[table omitted]

(b)

[table omitted]

(c) Total of subtotals A and B_____

3. Multiply the total determined in paragraph 2 by the base level.

4. Multiply the teacher experience index of the district or 1.00, whichever is greater, by the product obtained in paragraph 3.

Sec. 7. Section 41-1279.03, Arizona Revised Statutes, is amended to read:

41-1279.03. Powers and duties

A. The auditor general shall:

1. Prepare an audit plan for approval by the committee and report to the committee the results of each audit and investigation and other reviews conducted by the auditor general.

2. Conduct or cause to be conducted at least biennial financial and compliance audits of financial transactions and accounts kept by or for all state agencies subject to the single audit act of 1984 (P.L. 98-502). The audits shall be conducted in accordance with generally accepted governmental auditing standards and accordingly shall include tests of the accounting records and other auditing procedures as may be considered necessary in the circumstances. The audits shall include the issuance of suitable reports as required by the single audit act of 1984 (P.L. 98-502) so the legislature, federal government and others will be informed as to the adequacy of financial statements of the state in compliance with generally accepted governmental accounting principles and to determine whether the state has complied with laws and regulations that may have a material effect on the financial statements and on major federal assistance programs.

3. Perform procedural reviews for all state agencies at times determined by the auditor general. These reviews may include evaluation of administrative and accounting internal controls and reports on such reviews.

4. Perform special research requests, special audits and related assignments as designated by the committee and conduct performance audits, special audits, special research requests and investigations of any state agency, whether created by the constitution or otherwise, as may be requested by the committee.

5. Annually on or before the fourth Monday of December, prepare a written report to the governor and to the committee which contains a summary of activities for the previous fiscal year.

6. In the tenth year and in each fifth year thereafter in which a transportation excise tax is in effect in a county as provided in section 42-6104, 42-6106 or 42-6107, conduct a performance audit that:

(a) Reviews past expenditures and future planned expenditures of the transportation excise revenues and determines the impact of the expenditures in solving transportation problems within the county and, for a transportation excise tax in effect in a county as provided in section 42-6107, determines whether the expenditures of the transportation excise revenues comply with section 28-6392, subsection B.

(b) Reviews projects completed to date and projects to be completed during the

remaining years in which a transportation excise tax is in effect. Within six months after each review period the auditor general shall present a report to the speaker of the house of representatives and the president of the senate detailing findings and making recommendations. If the parameters of the performance audit are set by the citizens transportation oversight committee, the auditor general shall also present the report to the citizens transportation oversight committee.

(c) Reviews, determines, reports and makes recommendations to the speaker of the house of representatives and the president of the senate whether the distribution of highway user revenues complies with title 28, chapter 18, article 2. If the parameters of the performance audit are set by the citizens transportation oversight committee, the auditor general shall also present the report to the citizens transportation oversight committee.

7. If requested by the committee, conduct performance audits of counties and incorporated cities and towns receiving highway user revenue fund monies pursuant to title 28, chapter 18, article 2 to determine if the monies are being spent as provided in section 28-6533, subsection B.

8. Perform special audits designated pursuant to law if the auditor general determines that there are adequate monies appropriated for the auditor general to complete the audit. If the auditor general determines the appropriated monies are inadequate, the auditor general shall notify the committee.

Appendix L

9. Beginning on July 1, 2001, establish a school-wide audit team in the office of the auditor general to conduct performance audits and monitor school districts to determine the percentage of every dollar spent in the classroom by a school district. THE PERFORMANCE AUDITS SHALL DETERMINE WHETHER SCHOOL DISTRICTS THAT RECEIVE MONIES FROM THE ARIZONA STRUCTURED ENGLISH IMMERSION FUND ESTABLISHED BY SECTION 15-756.04 AND THE STATEWIDE COMPENSATORY INSTRUCTION FUND ESTABLISHED BY SECTION 15-756.11 ARE IN COMPLIANCE WITH TITLE 15, CHAPTER 7, ARTICLE 3.1. The auditor general shall determine, through random selection, the school districts to be audited each year, subject to review by the joint legislative audit committee. A school district that is subject to an audit pursuant to this paragraph shall notify the auditor general in writing as to whether the school district agrees or disagrees with the findings and recommendations of the audit and whether the school district will implement the findings and recommendations, implement modifications to the findings and recommendations or refuse to implement the findings and recommendations. The school district shall submit to the auditor general a written status report on the implementation of the audit findings and recommendations every six months for two years after an audit conducted pursuant to this paragraph. The auditor general shall review the school district's progress toward implementing the findings and recommendations of the audit every six months after

receipt of the district's status report for two years. The auditor general may review a school district's progress beyond this two-year period for recommendations that have not yet been implemented by the school district. The auditor general shall provide a status report of these reviews to the joint legislative audit committee. The school district shall participate in any hearing scheduled during this review period by the joint legislative audit committee or by any other legislative committee designated by the joint legislative audit committee.

B. The auditor general may:

1. Subject to approval by the committee, adopt rules necessary to administer the duties of the office.

2. Hire consultants to conduct the studies required by subsection A, paragraphs 6 and 7 of this section.

C. If approved by the committee the auditor general may charge a reasonable fee for the cost of performing audits or providing accounting services for auditing federal funds, special audits or special services requested by political subdivisions of the state. Monies collected pursuant to this subsection shall be deposited in the audit services revolving fund.

D. The department of transportation, the board of supervisors of a county that has approved a county transportation excise tax as provided in section 42-6104, 42-6106 or 42-6107 and the

governing bodies of counties, cities and towns receiving highway user revenue fund monies shall cooperate with and provide necessary information to the auditor general or the auditor general's consultant.

E. The department of transportation shall reimburse the auditor general as follows, and the auditor general shall deposit the reimbursed monies in the audit services revolving fund:

1. For the cost of conducting the studies or hiring a consultant to conduct the studies required by subsection A, paragraph 6, subdivisions (a) and (b) of this section, from monies collected pursuant to a county transportation excise tax levied pursuant to section 42-6104, 42-6106 or 42-6107.

2. For the cost of conducting the studies or hiring a consultant pursuant to subsection A, paragraph 6, subdivision (c) and paragraph 7 of this section, from the Arizona highway user revenue fund.

Sec. 8. Budget request deadlines

A. Notwithstanding section 15-756.03, Arizona Revised Statutes, as added by this act, for fiscal year 2007-2008, school districts and charter schools shall submit structured English immersion budget requests to the department of education on or before December 1, 2006.

B. Notwithstanding section 15-756.11, Arizona Revised Statutes, as added by this act, for fiscal year 2006-2007, school districts and charter schools shall submit compensatory instruction

budget requests to the department of education on or before July 15, 2006.

Sec. 9. Appropriation; compensatory instruction; exemption

A. The sum of $10,000,000 is appropriated from the state general fund in fiscal year 2006-2007 to the department of education for deposit in the statewide compensatory instruction fund established by section 15-756.11, Arizona Revised Statutes, as added by this act, for distribution to school districts and charter schools.

B. The appropriation made in subsection A of this section is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 10. Appropriation; English language acquisition services; exemption

A. The sum of $2,555,000 is appropriated from the state general fund in fiscal year 2005-2006 to the department of education to provide English language acquisition services for the purposes of section 15-756.07, Arizona Revised Statutes, as added by this act, for the costs of providing English language proficiency assessments, scoring and ancillary materials as prescribed by the department of education to school districts and charter schools for the purposes of title 15, chapter 7, article 3.1, Arizona Revised Statutes, as amended by this act, and for the purposes contained within subsection C of this section.

B. The department of education may use the monies appropriated pursuant to subsection A of this section to hire staff or contract with a third party to carry out the purposes of section 15-756.07, Arizona Revised Statutes, as added by this act.

C. Notwithstanding section 41-192, Arizona Revised Statutes, the superintendent of public instruction may use a portion of the monies appropriated pursuant to subsection A of this section to contract with one or more private attorneys to provide legal services in connection with the case of Flores v. State of Arizona, No. CIV 92-596-TUC-RCC.

D. The appropriation made in subsection A of this section is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 11. Appropriation; English language acquisition services; exemption

A. The sum of $4,610,000 is appropriated from the state general fund in fiscal year 2006-2007 to the department of education to provide English language acquisition services for the purposes of section 15-756.07, Arizona Revised Statutes, as added by this act, for the costs of providing English language proficiency assessments, scoring and ancillary materials as prescribed by the department of education to school districts and charter schools for the purposes of title 15, chapter 7, article 3.1, Arizona Revised Statutes, as amended by this act,

and for the purposes contained within subsection C of this section.

B. The department of education may use the monies appropriated pursuant to subsection A of this section to hire staff or contract with a third party to carry out the purposes of section 15-756.07, Arizona Revised Statutes, as added by this act, and for the purposes contained within subsection C of this section.

C. Notwithstanding section 41-192, Arizona Revised Statutes, the superintendent of public instruction may use a portion of the monies appropriated pursuant to subsection A of this section to contract with one or more private attorneys to provide legal services in connection with the case of Flores v. State of Arizona, No. CIV 92-596-TUC-RCC.

D. The appropriation made in subsection A of this section is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 12. Appropriation; auditor general; evaluation and compliance; exemption

A. The sum of $2,500,000 is appropriated from the state general fund in fiscal year 2006-2007 to the office of the auditor general for the purposes prescribed in section 15-756.12, Arizona Revised Statutes, as added by this act.

B. The appropriation made in subsection A of this section is exempt from the provisions of section

35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 13. Appropriation; ELL funding category

The sum of $14,300,000 is appropriated from the state general fund to the department of education in fiscal year 2006-2007 for distribution to schools and charter schools for the increased support level weight for pupils that qualify for the ELL funding category as prescribed in section 15-943, Arizona Revised Statutes, as amended by this act.

Sec. 14. Intent

A. The legislature declares that even though the legislature has never been named as a party in the litigation in Flores v. State of Arizona, No. CIV 92-596-TUC-RCC, the legislature has substantially increased funding for English language learners since 2000 by increasing the ELL weight by 233 per cent.

B. The legislature declares that because of the unique geographic and demographic characteristics of this state, it is impossible to compare language acquisition education models and solutions adopted by other states to the needs of this state and inappropriate to automatically adopt such models and solutions.

C. The legislature declares that it has grave concerns regarding the validity and reliability of the cost study performed by the National Conference of State Legislatures pursuant to Laws 2001, second special session, chapter 9, section 8.

Appendix L

The cost study used what it referred to as the "professional judgment approach" to determine incremental costs for English language learners, yet acknowledged that this kind of approach "depends on the judgments of educational professionals in identifying strategies rather than research that actually shows a linkage between the strategy and student performance".

D. Beginning in fiscal year 2006-2007, the legislature intends to enact a comprehensive, efficient and cost-effective program of developing research based models of structured English immersion that comply with all state and federal laws for use by school districts and charter schools and funding the incremental costs of the research based models that are in addition to the normal costs of conducting programs for English proficient students. Furthermore, classification of a pupil as an English language learner is fundamentally different than the classification of a pupil as qualified for any other group B weight category.

E. The legislature declares that the costs of implementing the new English language learner programs cannot be determined until the Arizona English language learners task force develops the research based models, as required by this act, due to the unique characteristics and demographics of more than two hundred school districts and more than five hundred charter schools in this state.

F. The legislature is appropriating additional monies to fund English language learner programs in an effort to provide additional resources

to school districts and charter schools for enhanced effectiveness of English language learner programs that comply with all state and federal laws.

G. The legislature believes that although the amount of monies spent on English language learners is important, equally important is the way the monies will be spent. For this reason, the legislature appropriated monies for model development, district support and monitoring, and intends that structured English immersion programs be subject to enhanced monitoring and compliance requirements, including effective audit and reporting requirements. The court referred to the three-fold inquiry cited in Castaneda v. Pickard, 648 F.2d 989, 1009-1010 (5th Cir. Unit A June 1981). This inquiry was that the educational theory is recognized as sound, that it was reasonably calculated to implement effectively the educational theory, but finally that the program produces results "indicating that the language barriers confronting students are actually being overcome".

Sec. 15. Conditional enactment; English language learner assistance; notice

A. Section 15-943, Arizona Revised Statutes, as amended by this act, and section 13 of this act, relating to appropriations to the department of education, do not become effective unless the United States District court for the district of Arizona in the case of Flores v. State of Arizona, No. CIV 92-596-TUC-RCC, issues an order that, by this act, the state has taken appropriate action to establish a program that addresses the orders in the

case and, at least on an interim basis, the court will permit this act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs.

B. The superintendent of public instruction shall notify the executive director of the Arizona legislative council in writing if the condition prescribed in subsection A of this section is met. This notice shall include the date on which the condition is met.

Appendix M

Rule 60 of Federal Rules of Civil Procedure

Rule 60. Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

1. mistake, inadvertence, surprise, or excusable neglect;

2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

4. the judgment is void;

5. the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

6. any other reason that justifies relief.

* * *

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, a minor child, et al.,	)	No. CV92-596-TUC-RCC
Plaintiffs,	)	
vs.	)	
STATE OF ARIZONA, et al.,	)	
Defendants.	)	

Excerpts from Testimony of Irene Moreno

* * *

p. 33

Q. And when you started at the department in April of 2003, can you describe the size and the quality of your staff?

A. There were six of us, including myself. One admin, one program project specialist and three education specialists. Only two of those education specialists actually had education background.

Q. When you came on board in April of 2003 were there some time-on-task issues within the English Acquisition Services department?

A. Yes, they were. The program specialists would go out monitoring, and when they came back the following day was supposed to be time off because they were out of the office doing particular monitoring, so that was an issue. They did that for a while because I was told that that was policy, if they were out of the office for a day then they took the next day off.

Q. Right. And did you change that policy?

A. Yes. I did get smart eventually.

Q. And what happened to the staff?

A. They all left.

Q. Now, over the years has your staff expanded?

A. Yes, it has.

Q. How many are in the English Acquisition Services department today?

p. 34

A. There are 16 of us, including myself.

Q. And have the duties of the English Acquisition Services department also expanded?

A. Yes, they have.

Q. In what way?

A. On top of additional monitoring that we're doing there is things that we had to develop. There were no proficiency standards in place. There's assessment pieces we have to do. There's technical assistance that we offer. There's professional

development. We put on several conferences in the time that we were -- that I've been there, and we also have developed an endorsement. Of course, there are requirements, but that has definitely increased as far as the workload.

Q. Is the -- would you say that the English Acquisition Services department is a strong and effective department within the Department of Education, the State of Arizona today?

A. I would say yes.

Q. And do they work hard and long hours?

A. Yes. Very hard and very long hours.

Q. Now, you're aware that a new bill, House Bill 2064, passed into law in March of 2006; is that correct?

p. 35

A. Was it March? Yes.

Q. And were monies appropriated under that bill so you could further expand the staff of the English Acquisition Services department?

A. Yes, they were.

Q. Do you recall how much money that was, approximately?

A. I don't. I know that they've asked for 20 additional staff because we're looking at not only monitoring but actually evaluating and school improvement, and we want to be able to offer the technical assistance in order to get there.

Q. Are you currently advertising for additional staff?

A. Yes, sir, we are.

Q. And to fill approximately you said 20 additional positions?

A. We've filled some of those already, but 20 additional is what the bill stated.

Q. I think you've already mentioned this, but since you have come to the department in April of 2003 -- and I'm going to call it the English Acquisition Services department, EAS for short -- has EAS undertaken a series of initiatives to improve statewide the delivery of services to English language

* * *

p. 45

A. Absolutely.

Q. Do the standards also -- do they also provide a gauge by which the department can provide oversight and assure that ELL students are receiving instruction in order to meet those standards?

A. I think the gauge is more through the professional development and having them actually understand their purpose. Because they have not been in place long enough for us to be able to do that, I would hope with time that that would be the case. We spent a lot of time with professional development, explaining how these work, tie them

into lesson plans and things of that nature so that teachers don't struggle, so that there's a comfort level that's entirely different than what we've been -- what we faced before.

Q. In your opinion were the creation of these standards a substantial advancement over what was in place prior to 2000?

A. I would say yes, because there was nothing in place.

Q. Kind of like going from zero to 10?

A. That's right.

Q. I want you to go to Exhibit 203, if you will, and which is a two-page document. And I want to go . . .

* * *

p. 49

. . . at 69 percent.

Q. What does 69 percent mean?

A. It was 69 percent aligned to our standards. In other words, 69 percent of what we were assessing was being done with that particular test.

Q. And did SELP more than -- what does SELP stand for?

A. Stanford English Language Proficiency.

Q. Did SELP more closely -- was it more closely aligned to the proficiency standards than any other exam?

A. Yes. That was the reason it was selected.

Q. Now, today is every school district or charter school in the State of Arizona required to use a single standardized test?

A. Yes. They are.

Q. Now, today is every school district or charter school in the State of Arizona required to use a single standardized test?

A. Yes, they are.

Q. When did SELP -- when was SELP adopted?

A. It was '04-05 school year. I don't remember the month exactly. But it's been used in '04-05 and '05-06 was the time frame we used it.

Q. So SELP was used for two years, the '04-05 school year and the '05-06 school year?

A. That's correct.

Q. Now, did Arizona go to a new test?

A. Unfortunately, our federal program officer

p. 50

stated that we needed to have something more closely aligned than 69 percent. They wanted a higher alignment. Again, we always seemed to be a little behind, so it was less expensive and easier to do an augmentation so we took the SELP, kept 30 percent of it and augmented the assessment, and now we are calling it AzELLA.

THE COURT: Calling it what?

THE WITNESS: Arizona English Language Learner Assessment.

BY MR. BISTROW:

Q. And is AzELLA the new assessment test that is currently in effect?

A. Yes, sir, it is.

Q. And every school district and charter school in the State of Arizona in terms of assessing and evaluating ELL students must now use AzELLA; is that correct?

A. That is correct.

Q. Now, I want you to turn to Exhibit 204. And I don't want to belabor the point with regard to this particular exhibit. Can you tell us generally, first of all, these documents are labeled "Proprietary and Confidential" and you understand that all of these documents are proprietary and confidential; correct?

* * *

p. 53

. . . level that they have to achieve to be classified as proficient?

A. I don't know what the score is exactly, but it's a proficiency level on the assessment. It is a composite score, so it averages everything out, and if you have a composite score proficient, then you are exited from the program.

Q. And if you are then classified as proficient, then were does the student go?

A. Would go into a mainstream classroom.

Q. And then are they deemed exited from the ELL program?

A. Yes, they are.

Q. Once you are exited from the ELL program, are ELL students reevaluated?

A. Yes, they are.

Q. Again, is -- are these all new requirements since the year 2000?

A. The students were always tracked or followed to make sure that they were doing -- I mean, that they're doing well, they were for a two-year period. With the new law it's requiring an assessment, a proficiency assessment of those students that, you know, for a two-year period.

Q. Now, you're talking about the new law under. . . .

* * *

p. 55

. . .statewide programs establishing a curriculum framework or endorsement process for educators providing structured English immersion policies for English language students?

A. There was not a structured English immersion endorsement per se, but there were the ESL endorsement and the bilingual endorsement. It wasn't necessarily by the state, but those were

available through our universities in order to work with these second language learners.

Q. Prior to the year 2000 did the state itself as opposed to courses you could take at the university level, did the state itself, the Department of Education, provide assistance for teachers and administrators to obtain language endorsements?

A. The state, no.

Q. Now, under your direction has the Department of Education designed and implemented structured English immersion endorsements?

A. Yes, we have.

Q. And does Arizona now require SEI endorsements?

A. SEI endorsement is required of everyone that holds a teaching certificate, from superintendents on down to regular teachers.

p. 56

Q. So all administrators and all teachers in the state of Arizona now must have an SEI endorsement?

A. If they hold a teaching certificate, yes.

Q. Now, how was the SEI endorsement developed?

A. Oh, gosh. That was a very, very long process as well. We pulled together constituents. Generally our task force meetings, oh, gosh, we had as many as 30 to 35 LEAs, universities, community colleges all

involved in that particular process. There was a lot of discussion as to what we wanted it to look like, the number of hours that it would entail. That truly took an entire year to put together.

We did come to consensus with every one of the task force meetings that we had. Again, every one of the universities was involved and, well, other -- Grand Canyon and then we had community colleges as well as our constituency.

Q. Now, as I understand it, there are -- well, why don't we do this. Let's turn to Exhibit 206. And Exhibit 206 is entitled Curricular Framework for Provisional Structured English Immersion Endorsement Training (15 Hours).

A. That's right.

Q. Now, are there two types of endorsements?

A. Actually, it's one endorsement, but one is a

p. 57

provisional which allows you to get through the process in pieces. It's a two-part, so you have a provisional that is good for three years and then you've got the additional 45 hours which constitutes the full endorsement.

Q. So a full endorsement then comprises the 15 hours, which allows you to have a provisional endorsement, and then 45 hours, so there's a total of 60 hours of work needed to get a full SEI endorsement?

A. That's correct.

Appendix N

Q. When, as I understand it, the provisional endorsement, every single teacher and administrator holding a teaching certificate in the State of Arizona must have had a provisional endorsement by August of 2006; is that correct?

A. August 31st of 2006, yes, that is correct.

Q. And what is the deadline for achieving the full endorsement by all Arizona teachers and administrators?

A. Full endorsement should be upon recertification, and that would vary. We need to keep in mind that the provisional is only -- is not renewable after three years. So, I mean, after the three-year period you can't renew it, so you would have to have it within that time.

p. 58

Q. You would then have to have your full endorsement?

A. Yes, sir.

Q. Now, the provisional endorsement entails I think you said 15 hours. Now, what kind of training is undertaken or is provided with regard to the 15 hours for the provisional endorsement?

A. The 15 hours can be professional development or it can be a one-credit semester at a university. And what we do is approve syllabi providers, and once those are approved they're taken before the board, the board approves those providers, and then they're placed on the web site so there's an opportunity to go through the web site and find

particular providers of that endorsement, the provisional.

We also have the Arizona K-12 center that's in partnership with ADE that offers the provisionals also working on the 45, and ASSET, which is on line also, has offered this.

Q. I'm going to get into the details a little bit on that.

A. Sorry.

Q. With regard to Exhibit 206, the first page of that exhibit, does that set forth the curricular framework for the provisional endorsement?

p. 59

A. Yes, that does.

Q. Does the second page of that exhibit set forth the curricular framework for the full endorsement?

A. That's correct.

Q. And what is the purpose of these endorsements?

A. Again, to give -- lift the comfort level of those teachers that did not work with second language learners, gives them strategies, gives them the foundations of SEI, why we are where we are. We talk about proficiency standards, which weren't in place, and also the assessment, which are all keys, tools that we use as teachers. So it's -- and the reason for the administration is, as we are working with our constituents, the comments always were,

well, they come to observe but they don't know what they're observing.

And so that was the reasoning there also, it gives everyone that comfort level of knowing what it is we're looking for and what is required to work with these students.

Q. Why is there a requirement that everybody have the -- at some point the full endorsement by 2009? Why not just those teachers who are involved

p. 60

in teaching ELL students?

A. And it wouldn't necessarily be 2009. I have to correct that quickly because that, I kind of have been stomped on about that, okay, so upon recertification.

The reason for that is because eventually, if you live in Arizona, you're going to encounter a second language learner. It may not necessarily be a Spanish speaker, but we've got people coming from everywhere and you need those strategies that help to get you to again lower that comfort level so they're no longer saying, "Those are your kids." You know, everyone takes part. This is all part of the education process.

Q. Now, there's a flow chart, which is the third page of Exhibit 206?

A. Yes, sir.

Q. Can you just briefly describe what is meant by this flow chart?

Appendix N

A. If you have a bilingual or an ESL endorsement, you don't have to have the SEI endorsement, you have had a lot of those strategies. The only thing, as we worked with the task force, was they asked that those teachers that have those look at assessment, an assessment piece, and also the . . .

* * *

p. 67

A. Initially it was just to disseminate information and answer questions. There were a lot of issues that come up, understanding things that are going on statewide, in particular EAS, and rather than having the wrong information out there, we just made it a point to be at necessary meetings and answer questions. They usually go from three to four hours. It's just a lot of conversation, a lot of anxieties are eased. Basically that's it.

Q. Do you get into technical issues at these meetings as well?

A. We get into all kinds of things at these meetings. Generally I tried to make sure that all the staff was there so that if there were data issues I had a data person able to do that, if there were fiscal application issues I had someone that could answer those fiscal application things. We have a Harcourt individual, doesn't work for Harcourt, it's EAS, but their expertise is in that particular area, so they are there. Then we have a monitoring person.

So I really worked trying to make sure that everyone that needed to be there was there so that

we could answer all questions and not have to say, well, we'll get back to you.

Q. Has the department also designed and

p. 68

developed annual structured English immersion seminars?

A. Yes, we have.

Q. And did any of this exist prior to the year 2003?

A. Not to my knowledge.

Q. And what is the purpose of these seminars?

A. Well, we initially I think started as let's share this information. There was new laws in place, we needed to make sure that they understood it. For me truly it was to build more of a rapport, "We're not out here to get you, we're really here to assist you."

The whole purpose was to offer some technical assistance, to be able to tell you, you know, guys we want you to be in compliance, it's not an issue of, yeah, we're going to write you up or we want to write corrective actions. That was the whole thought, is just to be of service.

Q. Do these seminars provide professional development?

A. They do.

Q. Do they provide up-to-date teaching strategies?

A. They do. We have national speakers and we . . .

* * *

p. 71

A. Not to my knowledge.

Q. Now, I want to show you Exhibit 209. Since the year 2000 has the department developed guidelines to monitor school districts and charter schools for compliance?

A. Yes, we have.

Q. Does the department require each school district to provide certain information?

A. Yes, it does.

Q. Do you require them to provide information regarding the number of ELL students classified for the first time?

A. Yes. I don't know if it's the first time. I have to throw that in there. We did not have reclassified actually requested anywhere, so, yes.

I'm sorry, I had to sort that in my head. I apologize.

Q. Well, what information do you require school districts and charter schools to provide?

A. When we monitor?

Q. Well --

A. Is that --

Appendix N

Q. You indicated that school districts and charter schools are required now to provide certain information, and one of the things you mentioned is . . .

p. 72

. . . the number of ELL students that are classified for the first time. What about the number of ELL students acquiring proficiency levels?

A. We need to have the number of students that are actually in the program, we need the number of students that are reclassified, and there needs to be a number of -- we need to know how many students have actually moved from one level to the next. I mean proficiency level.

Q. Under the *Flores* decree are there certain minimum requirements for monitoring?

A. Yes.

Q. And you understand the *Flores* consent decree?

A. I do.

Q. Can you tell us briefly what that consent decree requires?

A. The monitoring of 32 schools statewide. The top -- the first 12 or the top 12 are the larger number of districts that have the largest number of ELL students in that district. Then you have your next level, which is the middle numbers, so you monitor 10 of those particular schools. And then you've got

those schools that have less are the last level. So it's a total of 32 schools that we have to monitor.

p. 73

Q. Now, with the increased staff that you now have, have you been able to monitor more school districts than what is required by law?

A. Absolutely.

Q. How many -- can you tell the Court about that?

A. We actually have doubled the number of LEA districts that we are monitoring, and we are able to not just look at files, but able to monitor classrooms, speak to teachers, talk to administrators, do, you know, occasionally student-type interviews. So with the staff increase we've been able to get more of that done, plus offer more technical assistance.

Q. I just want to go through with you briefly Exhibit 209. The first page simply sets forth the requirements for monitoring; is that correct?

A. Yes.

Q. And then the next two pages are -- is the provision from House Bill 2064 dealing with monitoring; is that correct?

A. That is.

Q. Then the next document is entitled Overview of 2005-2006 Monitoring Results. Can you tell us briefly what that is, and then there's a series of documents that are attached to that.

Appendix N

p. 74

A. This actually gives you rule and it tells you what it is that we're looking for. Says each year the department shall monitor at least 32, and that was the 12 of the 50 LEAs with the highest enrollments, then 10 LEAs with LEAs that are not included in the 50 described, and then 10 that have 25 or less. So that's actually the rule.

The next page gives you an overview of what it was that we did. Some refer to technical assistance and monitoring, so we didn't just go in to do the monitoring, which was look at files and things of that nature that I've already spoken to, but we actually offered technical assistance. Could be, you know, corrective action that they wanted to go over, maybe they weren't sure how to set up a particular program, maybe there were notebook issues that they wanted some help with. So those varied.

As you can see, it's described, there's technical assistance, the monitoring. There was complaints, we also went on complaints. If we get a written complaint from a constituent, we make it a pint [sic] to go to that district and then get back to the person letting them know what we found and try to take care of things that way.

Q. Irene, also in this exhibit you have attached .

* * *

Appendix N

p. 77

Since you've been at EAS in 2003, with the expansion of your staff and the expansion of your duties, in your view has there been a substantial advancement in terms of ELL education in the State of Arizona?

A. Yes, I do.

Q. Now, Exhibit 210 is House Bill 2064; is that correct?

A. Yes, it is.

Q. Now, within the last couple of years did your office design and develop some structured English immersion models as guidelines for school districts throughout the State of Arizona?

A. We did.

Q. What was the purpose of those models?

A. Again, just guidance. Districts, as we sat through some of our PELL meetings and we made reference to the law, wanted to have some guidance, so we developed some models that we thought would fit in all the grade levels and shared them.

Q. How were the models developed?

A. Our staff, I mean, with just three of us, have over 70 years of teaching experience, so, you know, we did a lot of talking, read lots of articles and then did some compromising and came up with the

p. 78

models that we placed on the web site.

Q. By the way, does EAS have an advisory council?

A. It does.

Q. What is the advisory council?

A. The advisory council came together to revisit these particular models. They wanted more fluidity, they wanted something that gave them more leeway with what they were already working on. So we met, looked at the law and then talked about what they had in place, and -- and we haven't met in a while.

Q. Well, we talk about "models." You know, so that the Court is clear, what are "models"?

A. Models --

Q. "Models" are referred to in House Bill 2064. What are "models"?

A. It's the way, the structure and setup of a particular classroom. I think they go to the extent of looking at class size, curriculum -- oh, my goodness. It's -- the model is the way the program is set up for the SEI program.

Q. Now we have House Bill 2064; correct?

A. Yes, sir.

Q. And as I understand, under House Bill 2064, House Bill 2064 is now going to have mandatory models . . .

* * *

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, a minor child, et al.,	) No.) CV92-596-TUC-RCC
Plaintiffs,	)
vs.	)
STATE OF ARIZONA, et al.,	)
Defendants.	)

Excerpt from Testimony of Richard J. Valdivia

* * *

p. 116

. . . and then you subtract what their contribution would be from the qualifying tax rate, and the difference is the basic state aid.

Q. So if their tax rate falls short the state makes up the difference --

A. Correct.

Q. -- to get to that rate?

A. Correct.

Q. We've talked about the school facilities board, we've talked abut the basic state aid for M&O.

Let's talk about the changes that have taken place in financing Arizona education since 2000.

A. Okay.

Q. And a big one is Proposition 301. Would you explain what that is, pleas?

A. Well, the voters - - you know, some time ago I guess the legislature and the governor passed a proposition or implemented a proposition that would implement a 6/10th of a percent sales tax, and this sales tax was used to make funding available to schools. Now, specifically I believe 40 percent has to be used for teacher salaries, 20 percent I believe for maintenance and operation, and 40 percent I believe for like a menu of items.

Q. Let me suggest one correction. The 20

p. 117

percent is performance-based pay.

A. Performance-based pay, I'm sorry.

Q. For the teachers?

A. That's correct. Again, I'm off the top of my head. And then these funds are made available to schools, and it was a way to anticipate, I guess, some of the future needs of schools and provide for that.

Q. So whatever funds are generated by that 6/10th of a percent on the state sales rate, sales tax rate, a portion of that goes to K-12?

A. Correct.

Q. Of that, 40 percent goes off the top to teacher salaries?

A. Correct.

Q. Twenty percent can go to salaries based on performance-based pay?

A. Correct.

Q. And then 40 goes for these menu items?

A. Correct.

Q. Let's talk about what the menu items are.

A. Okay.

Q. Okay. To the best you can recall, tell us what the six menu items are.

A. Well, they can use them for supplies, they can use them for computers, they can use them to

p. 118

offset teacher insurance for -- I believe it's for legal fees and this type of thing, and I believe they can use them for maintenance and operations also.

Q. Let's look at these specifically. Part of it can go -- one of the menu items is teacher salaries?

A. Correct.

Q. So you get 40 percent off the top, you get the 20 percent for performance-based pay, the other 40 percent can be used for salaries?

A. Correct.

Q. Now, by the way, I need to add one qualifier. That 40 percent what we call the menu items, the school board decides how to spend it?

A. Correct. Class size reduction is also a big item.

Q. I'm going to get to that, but I want to clarify first that the local board has to look at what the local needs are among these six items?

A. Correct.

Q. Okay. Now, of the six items we've established one of them was the teacher salaries. What about class size reduction?

A. Well, those funds may also be used for class size reduction.

Q. What about dropout prevention?

p. 119

A. And dropout prevention services also.

Q. What about AIMS intervention?

A. It can be used for AIMS intervention.

Q. You mentioned a quirky insurance thing.

A. Correct. I'm not specifically familiar on that, but it can be used, I believe it's for liability insurance for teachers.

Q. Liability insurance for teachers in case they get sued?

A. Correct.

Q. Okay. What I'd like to do now, Mr. Valdivia, is turn to some exhibits, because what I'd like to do now is try to focus on the actual dollar amounts.

We've talked about the systematic changes, but now what I'd like to do is talk about how those changes have worked out in actual dollars. First we're going to go statewide and then we're going to go to Nogales.

A. Okay.

Q. And I forgot one. We talked about Proposition 301, but there was another proposition, that is the Indian Gaming Proposition; remember that?

A. Yes.

Q. And in 2002 I believe the voters approved this compact between the state of Arizona and our

p. 120

various Indian tribes that had casinos?

A. Correct.

Q. And that actually generates some money for schools?

A. That is correct.

Q. In fact, if you look at Exhibit 240 - -

A. I'm going to have to put on my glasses now.

Q. Please help yourself.

A. Okay.

MR. CANTELME: Your Honor, I have offered another exhibit -- well, let me set up a little, I'll T it up a little bit.

BY MR. CANTELME:

Q. This Exhibit 240, which is in evidence, this, you go up to the top, is as of January 30, 2006, so that's about a year ago, and when we go down to the Instructional Improvement Fund, that's what goes to schools, to K-12; right?

A. That is correct.

Q. And as -- for last fiscal year, as of January 30, it says 28 million, 537 and change?

A. That is correct.

Q. Okay. And then for fiscal year 2005 it was $31,403,470.58?

A. That's correct.

* * *

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, a minor child, et al.,	) No.) CV92-596-TUC-RCC
Plaintiffs,	)
vs.	)
STATE OF ARIZONA, et al.,	)
Defendants.	)

Excerpt from Testimony of Margaret Garcia-Dugan

* * *

p. 131

. . . that Proposition 203 was at least somewhat implemented, and I think now that it's become fully implemented as much as I think it needs to be, or should be.

But in 2003 we knew we were getting some inroads within putting through Prop 203, so I had the research and evaluation department find -- you know, put a study together and let's look at students who were ELL in 2003 and match those students to their scores of the AIMS test in 2005, and then let's rank them, let's find out what school is doing the

best and let's go and find out why they're doing the best.

So this is what came from that study.

Q. Exhibit 216 is the result of that particular study?

A. Yes. Each of these schools had to have at least 100 AIMS tests in order to qualify. I didn't want to put a school in there that only had three ELL kids because it wouldn't really give us the robust study I wanted. So I said we needed to at least have a hundred tests so we can at least make some determination.

Q. Now, I want you to go to Exhibit 216. And on the far left-hand corner of that exhibit you have a school code?

A. Yes.

Q. You see that? What is a school code?

A. Every school has a school code in the state, and that lets us know what district they belong to.

Q. Then you have, of course, the school name is the next column?

p. 132

A. Yes.

Q. And then you have number, and that is the number that refers to the number of tests?

A. Yes. Every student is given three tests, one in reading, one in writing, one in math, so that would be about a hundred kids.

Q. Okay. Then you have a percent pass '05?

A. Yes. What we did, we matched the students that we identified in 2007 as being English language learners, and then I wanted to make sure that they were still around in 2005 so I could see how well they had done on the AIMS test in 2005.

Q. So when you say percent pass in '05, for example, Gallego Basic Elementary School, 83.94 percent, which is according -- well, before we go into that, you have ranking?

A. Yes. They were the number-one school in the state.

Q. Then when we say percent pass '05, is that

p. 133

the percent who passed all three AIMS tests?

A. Yes, sir.

Q. Now, you'll notice that in the top ten schools you have four schools from Nogales, and can you read those, read off the names of those schools?

A. Vasquez De Coronado Francisco School, Robert Bracker Elementary, Lincoln Elementary, and Challenger Elementary.

Q. When you saw that there were four schools from Nogales Unified School District, did this provide you with some -- was this significant to you?

A. Yes, it was.

Q. And why was that?

A. Well, it was an isolated school. I mean, there were four schools from one district, and that was the only district that had so many schools, and I thought that to me says there's systemic things going on at Nogales Unified. When you have four schools in the top 10, you need to really look to see why that's happening, and to me it was exciting, I know that the *Flores* came from Nogales, I had heard that Nogales was doing well, I, you know, had nothing to base it on until I ran this study and then it pops out.

So I was very excited to see that we had one district that was really shining because we were

p. 134

trying to find some school districts in Arizona that we could find out what their best practices were so we could share those with other districts, and Nogales came out.

Q. Now, in terms of the average pass rate in the state of Arizona for all students, what is that average pass rate for all three AIMS?

A. Approximately 66 percent.

Q. And you had one school from Nogales, Vasquez De Coronado, which was at 77.86 percent?

A. Yes, sir.

Q. Now, through the course of testimony that's been elicited to date, and you've been sitting here in the courtroom, we have gone through numerous exhibits documenting how well ELL students have been performing on AIMS tests, we've had discussions on norm reference tests and things of

that nature, and you've reviewed many of these documents as well; is that correct?

A. Yes, sir.

Q. What conclusions do you draw from all of this data that's been before the Court in terms of how ELL students are going in the Nogales Unified School District?

A. From all the data that I have reviewed on Nogales, I would say Nogales Unified School District

p. 135

is doing an exemplary job with their English language learners.

Q. Now, I have put in front of you Exhibit 245, and can you tell us what that document is?

A. It's a district report card for the Scottsdale Unified School District.

Q. And this is the report card dated 2005-2006; is that correct?

A. Yes, it is.

Q. And this sets forth data based on AIMS for the 2004-2005, 2003-2004 years; is that correct?

A. Yes, sir.

Q. And at some juncture we should be getting the latest report card for Nogales and all the -- Nogales, Scottsdale, all the other unified school districts; is that correct?

A. Yes, sir.

Appendix N

Q. Now, did you have an opportunity to compare Scottsdale Unified School District's district report card for 2005-2006 with the district report card for the Nogales Unified School District for that same period, 2005-2006?

A. Yes, I did.

Q. Can you just generally, I'm not going to have you go through all the numbers because they're . . .

* * *

Appendix N

Arizona Proposition 203

OFFICIAL TITLE

AN INITIATIVE MEASURE

TITLE 15, CHAPTER 7, ARTICLE 3.1, ARIZONA REVISED STATUTES, IS REPEALED. SEC. 3. TITLE 15, CHAPTER 7, ARIZONA REVISED STATUTES, IS AMENDED BY ADDING A NEW ARTICLE 3.1, ENGLISH LANGUAGE EDUCATION FOR CHILDREN IN PUBLIC SCHOOLS

TEXT OF PROPOSED AMENDMENT

Sec. 1. Findings and Declarations

The People of Arizona find and declare:

1. The English language is the national public language of the United States of America and of the state of Arizona. It is spoken by the vast majority of Arizona residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and

2. Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and

3. The government and the public schools of Arizona have a moral obligation and a constitutional duty to provide all of Arizona's children regardless of their ethnicity or national origins, with the skills necessary to become

productive members of our society. Of these skills, literacy in the English language is among the most important.

4. The public schools of Arizona currently do an inadequate job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children.

5. Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.

6. Therefore it is resolved that: all children in Arizona public schools shall be taught English as rapidly and effectively as possible.

7. Under circumstances in which portions of this statute are subject to conflicting interpretations, these Findings and Declarations shall be assumed to contain the governing intent of the statute.

Sec. 2. Repeal

Title 15, chapter 7, article 3.1, Arizona Revised Statutes, is repealed.

Sec. 3. Title 15, chapter 7, Arizona Revised Statutes, is amended by adding a new article 3.1, to read:

Appendix N

ARTICLE 3.1. ENGLISH LANGUAGE EDUCATION FOR CHILDREN IN PUBLIC SCHOOLS

SECTION 15-751. DEFINITIONS

IN THIS ARTICLE,

1. "BILINGUAL EDUCATION/NATIVE LANGUAGE INSTRUCTION" MEANS A LANGUAGE ACQUISITION PROCESS FOR STUDENTS IN WHICH MUCH OR ALL INSTRUCTION, TEXTBOOKS, OR TEACHING MATERIALS ARE IN THE CHILD'S NATIVE LANGUAGE OTHER THAN ENGLISH.

2. "ENGLISH LANGUAGE CLASSROOM" MEANS A CLASSROOM IN WHICH ENGLISH IS THE LANGUAGE OF INSTRUCTION USED BY THE TEACHING PERSONNEL, AND IN WHICH SUCH TEACHING PERSONNEL POSSESS A GOOD KNOWLEDGE OF THE ENGLISH LANGUAGE. ENGLISH LANGUAGE CLASSROOMS ENCOMPASS BOTH ENGLISH LANGUAGE MAINSTREAM CLASSROOMS AND SHELTERED ENGLISH IMMERSION CLASSROOMS

3. "ENGLISH LANGUAGE MAINSTREAM CLASSROOM" MEANS A CLASSROOM IN WHICH THE STUDENTS EITHER ARE NATIVE SPEAKERS OR ALREADY HAVE ACQUIRED REASONABLE FLUENCY IN ENGLISH.

4. "ENGLISH LEARNER" OR "LIMITED ENGLISH PROFICIENT STUDENT" MEANS A CHILD WHO DOES NOT SPEAK ENGLISH OR

WHOSE NATIVE LANGUAGE IS NOT ENGLISH, AND WHO IS NOT CURRENTLY ABLE TO PERFORM ORDINARY CLASSROOM WORK IN ENGLISH.

5. "SHELTERED ENGLISH IMMERSION" OR "STRUCTURED ENGLISH IMMERSION" MEANS AN ENGLISH LANGUAGE ACQUISITION PROCESS FOR YOUNG CHILDREN IN WHICH NEARLY ALL CLASSROOM INSTRUCTION IS IN ENGLISH BUT WITH THE CURRICULUM AND PRESENTATION DESIGNED FOR CHILDREN WHO ARE LEARNING THE LANGUAGE. BOOKS AND INSTRUCTIONAL MATERIALS ARE IN ENGLISH AND ALL READING, WRITING, AND SUBJECT MATTER ARE TAUGHT IN ENGLISH. ALTHOUGH TEACHERS MAY USE A MINIMAL AMOUNT OF THE CHILD'S NATIVE LANGUAGE WHEN NECESSARY, NO SUBJECT MATTER SHALL BE TAUGHT IN ANY LANGUAGE OTHER THAN ENGLISH, AND CHILDREN IN THIS PROGRAM LEARN TO READ AND WRITE SOLELY IN ENGLISH. THIS EDUCATIONAL METHODOLOGY REPRESENTS THE STANDARD DEFINITION OF "SHELTERED ENGLISH" OR "STRUCTURED ENGLISH" FOUND IN EDUCATIONAL LITERATURE.

SECTION 15-752. <u>ENGLISH LANGUAGE EDUCATION</u>

SUBJECT TO THE EXCEPTIONS PROVIDED IN SECTION 15-753, ALL CHILDREN IN ARIZONA PUBLIC SCHOOLS SHALL BE TAUGHT ENGLISH BY BEING TAUGHT IN

Appendix N

ENGLISH AND ALL CHILDREN SHALL BE PLACED IN ENGLISH LANGUAGE CLASSROOMS. CHILDREN WHO ARE ENGLISH LEARNERS SHALL BE EDUCATED THROUGH SHELTERED ENGLISH IMMERSION DURING A TEMPORARY TRANSITION PERIOD NOT NORMALLY INTENDED TO EXCEED ONE YEAR. LOCAL SCHOOLS SHALL BE PERMITTED BUT NOT REQUIRED TO PLACE IN THE SAME CLASSROOM ENGLISH LEARNERS OF DIFFERENT AGES BUT WHOSE DEGREE OF ENGLISH PROFICIENCY IS SIMILAR. LOCAL SCHOOLS SHALL BE ENCOURAGED TO MIX TOGETHER IN THE SAME CLASSROOM ENGLISH LEARNERS FROM DIFFERENT NATIVE-LANGUAGE GROUPS BUT WITH THE SAME DEGREE OF ENGLISH FLUENCY. ONCE ENGLISH LEARNERS HAVE ACQUIRED A GOOD WORKING KNOWLEDGE OF ENGLISH AND ARE ABLE TO DO REGULAR SCHOOL WORK IN ENGLISH, THEY SHALL NO LONGER BE CLASSIFIED AS ENGLISH LEARNERS AND SHALL BE TRANSFERRED TO ENGLISH LANGUAGE MAINSTREAM CLASSROOMS. AS MUCH AS POSSIBLE, CURRENT PER CAPITA SUPPLEMENTAL FUNDING FOR ENGLISH LEARNERS SHALL BE MAINTAINED. FOREIGN LANGUAGE CLASSES FOR CHILDREN WHO ALREADY KNOW ENGLISH SHALL BE COMPLETELY UNAFFECTED, AS SHALL SPECIAL EDUCATIONAL PROGRAMS FOR PHYSICALLY- OR MENTALLY-IMPAIRED STUDENTS.

Appendix N

SECTION 15-753. PARENTAL WAIVERS

A. THE REQUIREMENTS OF SECTION 15-752 MAY BE WAIVED WITH THE PRIOR WRITTEN INFORMED CONSENT, TO BE PROVIDED ANNUALLY, OF THE CHILD'S PARENTS OR LEGAL GUARDIAN UNDER THE CIRCUMSTANCES SPECIFIED IN THIS SECTION. SUCH INFORMED CONSENT SHALL REQUIRE THAT SAID PARENTS OR LEGAL GUARDIAN PERSONALLY VISIT THE SCHOOL TO APPLY FOR THE WAIVER AND THAT THEY THERE BE PROVIDED A FULL DESCRIPTION OF THE EDUCATIONAL MATERIALS TO BE USED IN THE DIFFERENT EDUCATIONAL PROGRAM CHOICES AND ALL THE EDUCATIONAL OPPORTUNITIES AVAILABLE TO THE CHILD. IF A PARENTAL WAIVER HAS BEEN GRANTED, THE AFFECTED CHILD SHALL BE TRANSFERRED TO CLASSES TEACHING ENGLISH AND OTHER SUBJECTS THROUGH BILINGUAL EDUCATION TECHNIQUES OR OTHER GENERALLY RECOGNIZED EDUCATIONAL METHODOLOGIES PERMITTED BY LAW. INDIVIDUAL SCHOOLS IN WHICH 20 STUDENTS OR MORE OF A GIVEN GRADE LEVEL RECEIVE A WAIVER SHALL BE REQUIRED TO OFFER SUCH A CLASS; IN ALL OTHER CASES, SUCH STUDENTS MUST BE PERMITTED TO TRANSFER TO A PUBLIC SCHOOL IN WHICH SUCH A CLASS IS OFFERED.

Appendix N

B. THE CIRCUMSTANCES IN WHICH A PARENTAL EXCEPTION WAIVER MAY BE APPLIED FOR UNDER THIS SECTION ARE AS FOLLOWS:

1. CHILDREN WHO ALREADY KNOW ENGLISH: THE CHILD ALREADY POSSESSES GOOD ENGLISH LANGUAGE SKILLS, AS MEASURED BY ORAL EVALUATION OR STANDARDIZED TESTS OF ENGLISH VOCABULARY COMPREHENSION, READING, AND WRITING, IN WHICH THE CHILD SCORES APPROXIMATELY AT OR ABOVE THE STATE AVERAGE FOR HIS GRADE LEVEL OR AT OR ABOVE THE 5TH GRADE AVERAGE, WHICHEVER IS LOWER OR;

2. OLDER CHILDREN: THE CHILD IS AGE 10 YEARS OR OLDER, AND IT IS THE INFORMED BELIEF OF THE SCHOOL PRINCIPAL AND EDUCATIONAL STAFF THAT AN ALTERNATE COURSE OF EDUCATIONAL STUDY WOULD BE BETTER SUITED TO THE CHILD'S OVERALL EDUCATIONAL PROGRESS AND RAPID ACQUISITION OF BASIC ENGLISH LANGUAGE SKILLS; OR

3. CHILDREN WITH SPECIAL INDIVIDUAL NEEDS: THE CHILD ALREADY HAS BEEN PLACED FOR A PERIOD OF NOT LESS THAN THIRTY CALENDAR DAYS DURING THAT SCHOOL YEAR IN AN ENGLISH LANGUAGE CLASSROOM AND IT IS SUBSEQUENTLY THE INFORMED BELIEF OF THE SCHOOL PRINCIPAL AND EDUCATIONAL STAFF THAT

Appendix N

THE CHILD HAS SUCH SPECIAL AND INDIVIDUAL PHYSICAL OR PSYCHOLOGICAL NEEDS, ABOVE AND BEYOND THE CHILD'S LACK OF ENGLISH PROFICIENCY, THAT AN ALTERNATE COURSE OF EDUCATIONAL STUDY WOULD BE BETTER SUITED TO THE CHILD'S OVERALL EDUCATIONAL DEVELOPMENT AND RAPID ACQUISITION OF ENGLISH. A WRITTEN DESCRIPTION OF NO LESS THAN 250 WORDS DOCUMENTING THESE SPECIAL INDIVIDUAL NEEDS FOR THE SPECIFIC CHILD MUST BE PROVIDED AND PERMANENTLY ADDED TO THE CHILD'S OFFICIAL SCHOOL RECORDS, AND THE WAIVER APPLICATION MUST CONTAIN THE ORIGINAL AUTHORIZING SIGNATURES OF BOTH THE SCHOOL PRINCIPAL AND THE LOCAL SUPERINTENDENT OF SCHOOLS. ANY SUCH DECISION TO ISSUE SUCH AN INDIVIDUAL WAIVER IS TO BE MADE SUBJECT TO THE EXAMINATION AND APPROVAL OF THE LOCAL SCHOOL SUPERINTENDENT, UNDER GUIDELINES ESTABLISHED BY AND SUBJECT TO THE REVIEW OF THE LOCAL GOVERNING BOARD AND ULTIMATELY THE STATE BOARD OF EDUCATION. TEACHERS AND LOCAL SCHOOL DISTRICTS MAY REJECT WAIVER REQUESTS WITHOUT EXPLANATION OR LEGAL CONSEQUENCE, THE EXISTENCE OF SUCH SPECIAL INDIVIDUAL NEEDS SHALL NOT COMPEL ISSUANCE OF A WAIVER, AND THE PARENTS SHALL BE FULLY INFORMED OF

THEIR RIGHT TO REFUSE TO AGREE TO A WAIVER.

SECTION 15-754. LEGAL STANDING AND PARENTAL ENFORCEMENT

AS DETAILED IN SECTIONS 15-752 AND 15-753, ALL ARIZONA SCHOOL CHILDREN HAVE THE RIGHT TO BE PROVIDED AT THEIR LOCAL SCHOOL WITH AN ENGLISH LANGUAGE PUBLIC EDUCATION. THE PARENT OR LEGAL GUARDIAN OF ANY ARIZONA SCHOOL CHILD SHALL HAVE LEGAL STANDING TO SUE FOR ENFORCEMENT OF THE PROVISIONS OF THIS STATUTE, AND IF SUCCESSFUL SHALL BE AWARDED NORMAL AND CUSTOMARY ATTORNEY'S FEES AND ACTUAL AND COMPENSATORY DAMAGES, BUT NOT PUNITIVE OR CONSEQUENTIAL DAMAGES. ANY SCHOOL BOARD MEMBER OR OTHER ELECTED OFFICIAL OR ADMINISTRATOR WHO WILLFULLY AND REPEATEDLY REFUSES TO IMPLEMENT THE TERMS OF THIS STATUTE MAY BE HELD PERSONALLY LIABLE FOR FEES AND ACTUAL AND COMPENSATORY DAMAGES BY THE CHILD'S PARENTS OR LEGAL GUARDIAN, AND CANNOT BE SUBSEQUENTLY INDEMNIFIED FOR SUCH ASSESSED DAMAGES BY ANY PUBLIC OR PRIVATE THIRD PARTY. ANY INDIVIDUAL FOUND SO LIABLE SHALL BE IMMEDIATELY REMOVED FROM OFFICE, AND SHALL BE BARRED FROM HOLDING ANY POSITION OF AUTHORITY ANYWHERE WITHIN

Appendix N

THE ARIZONA PUBLIC SCHOOL SYSTEM FOR AN ADDITIONAL PERIOD OF FIVE YEARS.

SECTION 15-755. STANDARDIZED TESTING FOR MONITORING EDUCATION PROGRESS

IN ORDER TO ENSURE THAT THE EDUCATIONAL PROGRESS OF ALL ARIZONA STUDENTS IN ACADEMIC SUBJECTS AND IN LEARNING ENGLISH IS PROPERLY MONITORED, A STANDARDIZED, NATIONALLY-NORMED WRITTEN TEST OF ACADEMIC SUBJECT MATTER GIVEN IN ENGLISH SHALL BE ADMINISTERED AT LEAST ONCE EACH YEAR TO ALL ARIZONA PUBLIC SCHOOLCHILDREN IN GRADES 2 AND HIGHER. ONLY STUDENTS CLASSIFIED AS SEVERELY LEARNING DISABLED MAY BE EXEMPTED FROM THIS TEST. THE PARTICULAR TEST TO BE USED SHALL BE SELECTED BY THE OFFICE OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, AND IT IS INTENDED THAT THE TEST SHALL GENERALLY REMAIN THE SAME FROM YEAR TO YEAR. THE NATIONAL PERCENTILE SCORES OF STUDENTS SHALL BE CONFIDENTIALLY PROVIDED TO INDIVIDUAL PARENTS, AND THE AGGREGATED PERCENTILE SCORES AND DISTRIBUTIONAL DATA FOR INDIVIDUAL SCHOOLS AND SCHOOL DISTRICTS SHALL BE MADE PUBLICLY AVAILABLE ON AN INTERNET WEB SITE; THE SCORES FOR STUDENTS CLASSIFIED AS "LIMITED-ENGLISH" SHALL BE

Appendix N

SEPARATELY SUB-AGGREGATED AND MADE PUBLICLY AVAILABLE THERE AS WELL. ALTHOUGH ADMINISTRATION OF THIS TEST IS REQUIRED SOLELY FOR MONITORING EDUCATIONAL PROGRESS, ARIZONA PUBLIC OFFICIALS AND ADMINISTRATORS MAY UTILIZE THESE TEST SCORES FOR OTHER PURPOSES AS WELL IF THEY SO CHOOSE.

Sec. 4. Severability

If a provision of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 5. Application

The provisions of this act cannot be waived, modified, or set aside by any elected or appointed official or administrator, except as through the amendment process provided for in the Arizona constitution.

Appendix N

Arizona House Bill 2010

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 15, chapter 7, article 3.1, Arizona Revised Statutes, is amended by adding sections 15-756 and 15-756.01, to read:

15-756. Programs for English learners: requirements: federal funding

A The state board of education shall prescribe the manner in which:

1. THE PRIMARY OR HOME LANGUAGE FOR ALL NEW PUPILS who enroll in a school district or charter school SHALL BE IDENTIFIED.

2. THE ENGLISH LANGUAGE PROFICIENCY OF ALL Pupils with a primary OR home language other than English SHALL BE ASSESSED THROUGH THE ADMINISTRATION OF ENGLISH LANGUAGE PROFICIENCY EXAMS.

3. THE PROCESS OF REASSESSMENT OF ENGLISH LEARNERS FOR THE PURPOSE OF DETERMINING ENGLISH LANGUAGE PROFICIENCY SHALL BE CONDUCTED.

4. THE EVALUATION OF FORMER ENGLISH LEARNERS SHALL BE CONDUCTED.

5. TRAINING MAY BE ALLOWED THAT IS NOT PROVIDED BY A COLLEGE OR UNIVERSITY TO SUBSTITUTE FOR ANY OF THE COURSES REQUIRED FOR A STRUCTURED

Appendix N

ENGLISH IMMERSION ENDORSEMENT OR A BILINGUAL EDUCATION ENDORSEMENT IF ALL OF THE FOLLOWING CONDITIONS APPLY:

(a) THE STATE BOARD OF EDUCATION HAS REVIEWED THE CURRICULUM, TEXTBOOKS, GRADING PROCEDURES AND ATTENDANCE POLICIES AND DETERMINED THAT THE TRAINING IS COMPARABLE IN AMOUNT, SCOPE AND QUALITY TO A COURSE OFFERED BY A COLLEGE OR UNIVERSITY FOR A STRUCTURED ENGLISH IMMERSION OR BILINGUAL EDUCATION ENDORSEMENT.

(b) THE TRAINING MEETS THE PROFESSIONAL TEACHING STANDARDS ADOPTED BY THE STATE BOARD OF EDUCATION.

(c) THE STATE BOARD OF EDUCATION HAS REVIEWED THE QUALIFICATIONS OF THE INSTRUCTOR AND DETERMINED THAT THE INSTRUCTOR HAS SUFFICIENT EXPERIENCE TO EFFECTIVELY CONDUCT THE TRAINING.

B THE DEPARTMENT OF EDUCATION SHALL DEVELOP GUIDELINES FOR THE MONITORING OF SCHOOL DISTRICTS AND CHARTER SCHOOLS FOR THE PURPOSES OF ENSURING COMPLIANCE WITH ALL FEDERAL AND STATE LAWS REGARDING ENGLISH LEARNERS, INCLUDING REQUIRING EACH SCHOOL DISTRICT AND CHARTER SCHOOL TO ANNUALLY SUBMIT A REPORT TO THE

Appendix N

DEPARTMENT OF EDUCATION THAT INCLUDES THE FOLLOWING INFORMATION IDENTIFIED BY GRADE LEVEL AND BY SCHOOL:

1. THE NUMBER OF PUPILS WHO ARE CLASSIFIED AS ENGLISH LEARNERS FOR THE FIRST TIME.

2. THE NUMBER OF ENGLISH LEARNERS WHO ACHIEVED ENGLISH PROFICIENCY IN THE PAST ACADEMIC YEAR AND WHO EXITED THE ENGLISH LEARNER PROGRAM.

3. THE TOTAL NUMBER OF PUPILS CLASSIFIED AS ENGLISH LEARNERS.

4. THE NUMBER OF PUPILS WHO ARE ENROLLED IN EACH TYPE OF LANGUAGE ACQUISITION PROGRAM OFFERED BY THE SCHOOL DISTRICT OR CHARTER SCHOOL.

5. IF REQUESTED BY THE DEPARTMENT OF EDUCATION, THE TEST DATA USED TO DETERMINE ENGLISH PROFICIENCY.

C THE SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL ATTEMPT TO OBTAIN THE MAXIMUM AMOUNT OF FEDERAL FUNDING THAT IS AVAILABLE FOR BILINGUAL EDUCATION PROGRAMS AND STRUCTURED ENGLISH IMMERSION PROGRAMS AND ANY OTHER FUNDING FROM FEDERAL PROGRAMS THAT APPLY TO THE EDUCATIONAL NEEDS OF ENGLISH LEARNERS.

Appendix N

D THE DEPARTMENT OF EDUCATION SHALL SUBMIT AN ANNUAL REPORT TO THE GOVERNOR, THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES THAT INCLUDES AN ITEMIZED LIST OF ALL FEDERAL MONIES RECEIVED BY THE DEPARTMENT FOR LANGUAGE ACQUISITION PROGRAMS AND THE PURPOSES FOR WHICH THESE FEDERAL MONIES ARE DESIGNATED. THE DEPARTMENT SHALL SUBMIT A COPY OF THIS REPORT TO THE SECRETARY OF STATE AND THE DIRECTOR OF THE ARIZONA STATE LIBRARY, ARCHIVES AND PUBLIC RECORDS.

E NOTHING IN SUBSECTION A, PARAGRAPH 5 OF THIS SECTION SHALL BE CONSTRUED TO PROHIBIT A SCHOOL DISTRICT OR CHARTER SCHOOL FROM DEVELOPING OR PARTICIPATING IN A TRAINING PROGRAM THAT DOES NOT MEET THE CONDITIONS PRESCRIBED SUBSECTION A, PARAGRAPH 5.

15-756.01. Contracts with private vendors

School districts and charter schools may enter into contracts with private vendors that provide literacy services that are designed to make participating pupils who begin receiving the services in kindergarten successful at reading, writing and speaking English at the third grade level by the end of the third grade.

Sec. 2. Section 15-901, Arizona Revised Statutes, is amended to read:

Appendix N

15-901. Definitions

A In this title, unless the context otherwise requires:

1. "Average daily attendance" or "ADA" means actual average daily attendance through the first one hundred days or two hundred days in session, as applicable.

2. "Average daily membership" means the total enrollment of fractional students and full-time students, minus withdrawals, of each school day through the first one hundred days or two hundred days in session, as applicable, for the current year. Withdrawals include students formally withdrawn from schools and students absent for ten consecutive school days, except for excused absences as identified by the department of education. For computation purposes, the effective date of withdrawal shall be retroactive to the last day of actual attendance of the student.

(a) "Fractional student" means:

(i) For common schools, until fiscal year 2001-2002, a preschool child who is enrolled in a program for preschool children with disabilities of at least three hundred sixty minutes each week or a kindergarten student at least five years of age prior to January 1 of the school year and enrolled in a school kindergarten program that meets at least three hundred forty-six instructional hours during the minimum number of days required in a school year as provided in section 15-341. In fiscal year 2001-2002, the kindergarten program shall meet at

least three hundred forty-eight hours. In fiscal year 2002-2003, the kindergarten program shall meet at least three hundred fifty hours. In fiscal year 2003-2004, the kindergarten program shall meet at least three hundred fifty-two hours. In fiscal year 2004-2005, the kindergarten program shall meet at least three hundred fifty-four hours. In fiscal year 2005-2006 and each fiscal year thereafter, the kindergarten program shall meet at least three hundred fifty-six hours. Lunch periods and recess periods may not be included as part of the instructional hours unless the child's individualized education program requires instruction during those periods and the specific reasons for such instruction are fully documented. In computing the average daily membership, preschool children with disabilities and kindergarten students shall be counted as one-half of a full-time student. For common schools, a part-time student is a student enrolled for less than the total time for a full-time student as defined in this section. A part-time common school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three-fourths of the time a full-time student is enrolled as defined in subdivision (b) of this paragraph.

(ii) For high schools, a part-time student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a recognized high school and who is taught in less than twenty instructional hours per week prorated for any week with fewer than five

school days. A part-time high school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three-fourths of a full-time instructional program as defined in subdivision (c) of this paragraph.

(b) "Full-time student" means:

(i) For common schools, a student who is at least six years of age prior to January 1 of a school year, who has not graduated from the highest grade taught in the school district and who is regularly enrolled in a course of study required by the state board of education. Until fiscal year 2001-2002, first, second and third grade students, ungraded students at least six, but under nine, years of age by September 1 or ungraded group B children with disabilities who are at least five, but under six, years of age by September 1 must be enrolled in an instructional program that meets for a total of at least six hundred ninety-two hours during the minimum number of days required in a school year as provided in section 15-341. In fiscal year 2001-2002, the program shall meet at least six hundred ninety-six hours. In fiscal year 2002-2003, the program shall meet at least seven hundred hours. In fiscal year 2003-2004, the program shall meet at least seven hundred four hours. In fiscal year 2004-2005, the program shall meet at least seven hundred eight hours. In fiscal year 2005-2006 and in each fiscal year thereafter, the program shall meet at least seven hundred twelve hours. Until fiscal year 2001-2002, fourth, fifth and sixth grade students or

ungraded students at least nine, but under twelve, years of age by September 1 must be enrolled in an instructional program that meets for a total of at least eight hundred sixty-five hours during the minimum number of school days required in a school year as provided in section 15-341. In fiscal year 2001-2002, the program shall meet at least eight hundred seventy hours. In fiscal year 2002-2003, the program shall meet at least eight hundred seventy-five hours. In fiscal year 2003-2004, the program shall meet at least eight hundred eighty hours. In fiscal year 2004-2005, the program shall meet at least eight hundred eighty-five hours. In fiscal year 2005-2006 and each fiscal year thereafter, the program shall meet at least eight hundred ninety hours. Until fiscal year 2001-2002, seventh and eighth grade students or ungraded students at least twelve, but under fourteen, years of age by September 1 must be enrolled in an instructional program that meets for a total of at least one thousand thirty-eight hours during the minimum number of days required in a school year as provided in section 15-341. In fiscal year 2001-2002, the program shall meet at least one thousand forty-four hours. In fiscal year 2002-2003, the program shall meet at least one thousand fifty hours. In fiscal year 2003-2004, the program shall meet at least one thousand fifty-six hours. In fiscal year 2004-2005, the program shall meet at least one thousand sixty-two hours. In fiscal year 2005-2006 and each fiscal year thereafter, the program shall meet at least one thousand sixty-eight hours. Lunch periods and recess periods may not be included as part of the

instructional hours unless the student is a child with a disability and the child's individualized education program requires instruction during those periods and the specific reasons for such instruction are fully documented.

(ii) For high schools, a student not graduated from the highest grade taught in the school district, or an ungraded student at least fourteen years of age by September 1, and enrolled in at least a full-time instructional program of subjects that count toward graduation as defined by the state board of education in a recognized high school. A full-time student shall not be counted more than once for computation of average daily membership.

(iii) For homebound or hospitalized, a student receiving at least four hours of instruction per week.

(c) "Full-time instructional program" means at least four subjects, each of which, if taught each school day for the minimum number of days required in a school year, through fiscal year 2000-2001, would meet a minimum of one hundred twenty hours a year, or the equivalent, or one or more subjects taught in amounts of time totalling at least twenty hours per week prorated for any week with fewer than five school days. For fiscal years after 2000-2001:

(i) In fiscal years 2001-2002 and 2002-2003, each subject shall meet at least one hundred twenty-two hours. In fiscal year 2003-2004 and each fiscal year thereafter, each subject shall meet at least one hundred twenty-three hours.

(ii) For grades nine, ten and eleven, the total program shall meet at least eight hundred eighty hours in fiscal year 2001-2002. In fiscal year 2002-2003, the total program shall meet at least eight hundred eighty-five hours. In fiscal year 2003-2004, the total program shall meet at least eight hundred ninety hours. In fiscal year 2004-2005, the total program shall meet at least eight hundred ninety-five hours. In fiscal year 2005-2006 and each fiscal year thereafter, the total program shall meet at least nine hundred hours.

3. "Budget year" means the fiscal year for which the school district is budgeting and which immediately follows the current year.

4. "Common school district" means a political subdivision of this state offering instruction to students in programs for preschool children with disabilities and kindergarten programs and grades one through eight.

5. "Current year" means the fiscal year in which a school district is operating.

6. "Daily attendance" means:

(a) For common schools, days in which a pupil:

(i) Of a kindergarten program or ungraded, but not group B children with disabilities, and at least five, but under six, years of age by September 1 attends at least three-quarters of the instructional time scheduled for the day. If the total instruction time scheduled for the year is at least three hundred forty-six hours but is less than six

hundred ninety-two hours such attendance shall be counted as one-half day of attendance. If the instructional time scheduled for the year is at least six hundred ninety-two hours, "daily attendance" means days in which a pupil attends at least one-half of the instructional time scheduled for the day. Such attendance shall be counted as one-half day of attendance.

(ii) Of the first, second or third grades, ungraded and at least six, but under nine, years of age by September 1 or ungraded group B children with disabilities and at least five, but under six, years of age by September 1 attends more than three-quarters of the instructional time scheduled for the day.

(iii) Of the fourth, fifth or sixth grades or ungraded and at least nine, but under twelve, years of age by September 1 attends more than three-quarters of the instructional time scheduled for the day, except as provided in section 15-797.

(iv) Of the seventh or eighth grades or ungraded and at least twelve, but under fourteen, years of age by September 1 attends more than three-quarters of the instructional time scheduled for the day, except as provided in section 15-797.

(b) For common schools, the attendance of a pupil at three-quarters or less of the instructional time scheduled for the day shall be counted as follows, except as provided in section 15-797 and except that attendance for a fractional

student shall not exceed the pupil's fractional membership:

(i) If attendance for all pupils in the school is based on quarter days, the attendance of a pupil shall be counted as one-fourth of a day's attendance for each one-fourth of fill-time instructional time attended.

(ii) If attendance for all pupils in the school is based on half days, the attendance of at least three-quarters of the instructional time scheduled for the day shall be counted as a full day's attendance and attendance at a minimum of one-half but less than three-quarters of the instructional time scheduled for the day equals one-half day of attendance.

(c) For common schools, the attendance of a preschool child with disabilities shall be counted as one-fourth day's attendance for each thirty-six minutes of attendance not including lunch periods and recess periods, except as provided in paragraph 2, subdivision (a), item (i) of this subsection for children with disabilities up to a maximum of three hundred sixty minutes each week.

(d) For high schools or ungraded schools in which the pupil is at least fourteen years of age by September 1, the attendance of a pupil shall not be counted as a full day unless the pupil is actually and physically in attendance and enrolled in and carrying four subjects, each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of one hundred twenty hours a year, or the equivalent,

that count toward graduation in a recognized high school except as provided in section 15-797 and subdivision (e) of this paragraph. Attendance of a pupil carrying less than the load prescribed shall be prorated.

(e) For high schools or ungraded schools in which the pupil is at least fourteen years of age by September 1, the attendance of a pupil may be counted as one-fourth of a day's attendance for each sixty minutes of instructional time in a subject that counts toward graduation, except that attendance for a pupil shall not exceed the pupil's full or fractional membership.

(f) For homebound or hospitalized, a full day of attendance may be counted for each day during a week in which the student receives at least four hours of instruction.

(g) For school districts which maintain school for an approved year-round school year operation, attendance shall be based on a computation, as prescribed by the superintendent of public instruction, of the one hundred eighty days' equivalency or two hundred days' equivalency, as applicable, of instructional time as approved by the superintendent of public instruction during which each pupil is enrolled.

7. "Daily route mileage" means the sum of:

(a) The total number of miles driven daily by all buses of a school district while transporting eligible students from their residence to the school of attendance and from the school of

attendance to their residence on scheduled routes approved by the superintendent of public instruction.

(b) The total number of miles driven daily on routes approved by the superintendent of public instruction for which a private party, a political subdivision or a common or a contract carrier is reimbursed for bringing an eligible student from the place of his residence to a school transportation pickup point or to the school of attendance and from the school transportation scheduled return point or from the school of attendance to his residence.

Daily route mileage includes the total number of miles necessary to drive to transport eligible students from and to their residence as provided in this paragraph.

8. "District support level" means the base support level plus the transportation support level.

9. "Eligible students" means:

(a) Students who are transported by or for a school district and who qualify as full-time students or fractional students, except students for whom transportation is paid by another school district or a county school superintendent, and:

(i) For common school students, whose place of actual residence within the school district is more than one mile from the school facility of attendance or students who are admitted pursuant to section 15-816.01 and who meet the economic eligibility requirements established under the national school lunch and child nutrition acts (42

United States Code sections 1751 through 1785) for free or reduced price lunches and whose actual place of residence outside the school district boundaries is more than one mile from the school facility of attendance.

(ii) For high school students, whose place of actual residence within the school district is more than one and one-half miles from the school facility of attendance or students who are admitted pursuant to section 15-816.01 and who meet the economic eligibility requirements established under the national school lunch and child nutrition acts (42 United States Code sections 1751 through 1785) for free or reduced price lunches and whose actual place of residence outside the school district boundaries is more than one and one-half miles from the school facility of attendance.

(b) Kindergarten students, for purposes of computing the number of eligible students under subdivision (a), item (i) of this paragraph, shall be counted as full-time students, notwithstanding any other provision of law.

(c) Children with disabilities, as defined by section 15-761, who are transported by or for the school district or who are admitted pursuant to chapter 8, article 1.1 of this title and who qualify as full-time students or fractional students regardless of location or residence within the school district or children with disabilities whose transportation is required by the pupil's individualized education program.

(d) Students whose residence is outside the school district and who are transported within the school district on the same basis as students who reside in the school district.

10. "Enrolled" or "enrollment" means when a pupil is currently registered in the school district.

11. "GDP price deflator" means the average of the four implicit price deflators for the gross domestic product reported by the United States department of commerce for the four quarters of the calendar year.

12. "High school district" means a political subdivision of this state offering instruction to students for grades nine through twelve or that portion of the budget of a common school district which is allocated to teaching high school subjects with permission of the state board of education.

13. "Revenue control limit" means the base revenue control limit plus the transportation revenue control limit.

14. "Student count" means average daily membership as prescribed in this subsection for the fiscal year prior to the current year, except that for the purpose of budget preparation student count means average daily membership as prescribed in this subsection for the current year.

15. "Submit electronically" means submitted in a format and in a manner prescribed by the department of education.

Appendix N

16. "Total bus mileage" means the total number of miles driven by all buses of a school district during the school year.

17. "Total students transported" means all eligible students transported from their place of residence to a school transportation pickup point or to the school of attendance and from the school of attendance or from the school transportation scheduled return point to their place of residence.

18. "Unified school district" means a political subdivision of the state offering instruction to students in programs for preschool children with disabilities and kindergarten programs and grades one through twelve.

B In this title, unless the context otherwise requires:

1. "Base" means the revenue level per student count specified by the legislature.

2. "Base level" means:

(a) For fiscal year 1999-2000, two thousand five hundred fifty-nine dollars ninety-three cents.

(b) For fiscal year 2000-2001, two thousand five hundred eighty-five dollars sixty cents.

(c) For fiscal year 2001-2002, two thousand six hundred eighty-seven dollars thirty-two cents.

(d) For fiscal year 2002-2003, two thousand seven hundred fifty-three dollars ninety cents.

3. "Base revenue control limit" means the base revenue control limit computed as provided in section 15-944.

4. "Base support level" means the base support level as provided in section 15-943.

5. "Certified teacher" means a person who is certified as a teacher pursuant to the rules adopted by the state board of education, who renders direct and personal services to school children in the form of instruction related to the school district's educational course of study and who is paid from the maintenance and operation section of the budget.

6. "ED, MIMR, SLD, SLI and OHI" means programs for children with emotional disabilities, mild mental retardation, a specific learning disability, a speech/language impairment and other health impairments.

7. "ED-P" means programs for children with emotional disabilities who are enrolled in private special education programs as prescribed in section 15-765, subsection D, paragraph 1 or in an intensive school district program as provided in section 15-765, subsection D, paragraph 2.

8. "ELL" MEANS ENGLISH LEARNERS WHO DO NOT SPEAK ENGLISH OR WHOSE NATIVE LANGUAGE IS NOT ENGLISH, WHO ARE NOT CURRENTLY ABLE TO PERFORM ORDINARY CLASSROOM WORK IN ENGLISH AND WHO ARE ENROLLED IN AN ENGLISH LANGUAGE EDUCATION PROGRAM PURSUANT TO SECTIONS 15-751,15-752 AND 15-753.

9. "Full-time equivalent certified teacher" or "FTE certified teacher" means for a certified teacher the following:

(a) If employed full time as defined in section 15-501, 1.00.

(b) If employed less than full time, multiply 1.00 by the percentage of a full school day, or its equivalent, or a full class load, or its equivalent, for which the teacher is employed as determined by the governing board.

10. "Group A" means educational programs for career exploration, a specific learning disability, an emotional disability, mild mental retardation, remedial education, a speech/ language impairment, homebound, bilingual, preschool moderate delay, preschool speech/language delay, other health impairments and gifted pupils.

11. "Group B" means educational improvements for pupils in kindergarten programs and grades one through three, educational programs for autism, a hearing impairment, moderate mental retardation, multiple disabilities, multiple disabilities with severe sensory impairment, orthopedic impairments, preschool severe delay, severe mental retardation and emotional disabilities for school age pupils enrolled in private special education programs or in school district programs for children with severe disabilities or visual impairment and ~~limited English proficient pupils~~ ENGLISH LEARNERS enrolled in a program to promote English language proficiency pursuant to section ~~15-754~~ 15-752.

Appendix N

12. "HI" means programs for pupils with hearing impairment.

13. "Homebound" or "hospitalized" means a pupil who is capable of profiting from academic instruction but is unable to attend school due to illness, disease, accident or other health conditions, who has been examined by a competent medical doctor and who is certified by that doctor as being unable to attend regular classes for a period of not less than three school months or a pupil who is capable of profiting from academic instruction but is unable to attend school regularly due to chronic or acute health problems, who has been examined by a competent medical doctor and who is certified by that doctor as being unable to attend regular classes for intermittent periods of time totaling three school months during a school year. The medical certification shall state the general medical condition, such as illness, disease or chronic health condition, that is the reason that the pupil is unable to attend school. Homebound or hospitalized includes a student who is unable to attend school for a period of less than three months due to a pregnancy if a competent medical doctor, after an examination, certifies that the student is unable to attend regular classes due to risk to the pregnancy or to the student's health.

14. "K-3" means kindergarten programs and grades one through three.

15. "MD-R, A-R and SMR-R" means resource programs for pupils with multiple disabilities, autism and severe mental retardation.

Appendix N

16. "MD-SC, A-SC and SMR-SC" means self-contained programs for pupils with multiple disabilities, autism and severe mental retardation.

17. "MDSSI" means a program for pupils with multiple disabilities with severe sensory impairment.

18. "MOMR" means programs for pupils with moderate mental retardation.

19. "OI-R" means a resource program for pupils with orthopedic impairments.

20. "OI-SC" means a self-contained program for pupils with orthopedic impairments.

21. "PSD" means preschool programs for children with disabilities as provided in section 15-771.

22. "P-SD" means programs for children who meet the definition of preschool severe delay as provided in section 15-771.

23. "Qualifying tax rate" means the qualifying tax rate specified in section 15-971 applied to the assessed valuation used for primary property taxes.

24. "Small isolated school district" means a school district which meets all of the following:

(a) Has a student count of fewer than six hundred in kindergarten programs and grades one through eight or grades nine through twelve.

(b) Contains no school which is fewer than thirty miles by the most reasonable route from

another school, or, if road conditions and terrain make the driving slow or hazardous, fifteen miles from another school which teaches one or more of the same grades and is operated by another school district in this state.

(c) Is designated as a small isolated school district by the superintendent of public instruction.

25. "Small school district" means a school district which meets all of the following:

(a) Has a student count of fewer than six hundred in kindergarten programs and grades one through eight or grades nine through twelve.

(b) Contains at least one school which is fewer than thirty miles by the most reasonable route from another school which teaches one or more of the same grades and is operated by another school district in this state.

(c) Is designated as a small school district by the superintendent of public instruction.

26. "Transportation revenue control limit" means the transportation revenue control limit computed as prescribed in section 15-946.

27. "Transportation support level" means the support level for pupil transportation operating expenses as provided in section 15-945.

28. "VI" means programs for pupils with visual impairments.

29. "Voc. Ed." means vocational and technological education programs, as defined in

section 15-781, except that for the purpose of computing the district support level as provided in this title vocational and technological education programs only include approved vocational and technological programs for students in grades nine through twelve.

Sec. 3. Section 15-943, Arizona Revised Statutes, is amended to read:

15-943. Base support level

The base support level for each school district shall be computed as follows:

1. The following support level weights shall be used in paragraph 2, subdivision (a) for the following school districts:

(a) For school districts whose student count in kindergarten programs and grades one through eight is classified in column 1 of this subdivision, the support level weight for kindergarten programs and grades one through eight is the corresponding support level weight prescribed in column 2 or 3 of this subdivision, whichever is appropriate:

[table omitted]

(b) For school districts whose student count in grades nine through twelve is classified in column 1 of this subdivision, the support level weight for grades nine through twelve is the corresponding support level weight prescribed in column 2 or 3 of this subdivision, whichever is appropriate:

Appendix N

[table omitted]

2. Subject to paragraph 1, determine the weighted student count as follows:

(a)

[table omitted]

(b)

[table omitted]

(c) Total of subtotals A and B: ___

3. Multiply the total determined in paragraph 2 by the base level.

4. Multiply the teacher experience index of the district or 1.00, whichever is greater, by the product obtained in paragraph 3.

Sec. 4. Title 15, chapter 9, article 3, Arizona Revised Statutes, is amended by adding section 15-943.04, Arizona Revised Statutes, is amended to read:

15-943.04. English learner classroom personnel bonus fund; payment of English language classroom personnel bonuses

THE ENGLISH LEARNER CLASSROOM PERSONNEL BONUS FUND IS ESTABLISHED CONSISTING OF MONIES APPROPRIATED FOR THIS PURPOSE. THE DEPARTMENT OF EDUCATION SHALL ADMINISTER THE FUND. MONIES IN THE FUND ARE CONTINUOUSLY APPROPRIATED. THE DEPARTMENT OF EDUCATION SHALL DISTRIBUTE MONIES IN THE FUND TO SCHOOL DISTRICTS AND

Appendix N

CHARTER SCHOOLS IN THE AMOUNT OF TWO HUNDRED FIFTY DOLLARS FOR EVERY ENGLISH LEARNER, AS DEFINED IN SECTION 15-751, WHO WAS INSTRUCTED IN AN ENGLISH LEARNER PROGRAM IN THE PAST ACADEMIC YEAR, WHO ACHIEVED ENGLISH PROFICIENCY AND WHO EXITED THE ENGLISH LEARNER PROGRAM. SCHOOL DISTRICTS AND CHARTER SCHOOLS SHALL USE THE MONIES DISTRIBUTED PURSUANT TO THIS SECTION TO PAY BONUSES DIRECTLY TO CLASSROOM PERSONNEL, EXCLUDING PRINCIPALS AND ADMINISTRATORS, WHO ARE INVOLVED IN ENGLISH LEARNER PROGRAMS. A SCHOOL DISTRICT OR CHARTER SCHOOL SHALL NOT RECEIVE MORE THAN ONE DISTRIBUTION FROM THE ENGLISH LEARNER CLASSROOM PERSONNEL BONUS FUND FOR THE SAME PUPIL.

Sec. 5. Section 15-1626, Arizona Revised Statutes, is amended to read:

15-1626. General administrative powers of board

A The board shall:

1. Have and exercise the powers necessary for the effective governance and administration of the institutions under its control. To that end, the board may adopt, and authorize each university to adopt, such regulations, policies, rules or measures as are deemed necessary and may delegate in writing to its committees, to its university presidents, or their designees, or to other entities under its control,

any part of its authority for the administration and governance of such institutions, including those powers enumerated in section 15-1625, subsection B, paragraphs 2 and 4, paragraphs 3, 4, 7, 8, 10 and 11 of this subsection, and subsection B of this section. Any delegation of authority may be rescinded by the board at any time in whole or in part.

2. Appoint and employ and determine the compensation of presidents with such power and authority and for such purposes in connection with the operation of the institutions as the board deems necessary.

3. Appoint and employ and determine the compensation of vice-presidents, deans, professors, instructors, lecturers, fellows and such other officers and employees with such power and authority and for such purposes in connection with the operation of the institutions as the board deems necessary, or delegate its authority pursuant to paragraph 1 of this subsection.

4. Remove any officer or employee when the interests of education in this state so require in accordance with its personnel rules and policies.

5. Fix tuitions and fees to be charged and graduate the tuitions and fees between institutions and between residents, nonresidents and students from foreign countries. The amount of tuition, registration fees and other revenues included in the operating budget for the university adopted by the board as prescribed in paragraph 12 of this subsection shall be deposited, pursuant to sections 35-146 and 35-147. All other tuition and fee revenue

shall be retained by each university for expenditure as approved by the board. Except as provided in subsection H OF THIS SECTION, the Arizona board of regents shall adopt rules to govern its tuition and fee setting process which shall provide for the following:

(a) At least one public hearing at each university as an opportunity for students and members of the public to comment upon any proposed increase in tuition or fees.

(b) Publication of the NOTICE OF public hearing at least ten days prior to the hearing in a newspaper of general circulation in Maricopa county, Coconino county and Pima county. The notice shall include the date, time and location of the public hearing.

(c) Public disclosure by each university of any ~~recommended~~——PROPOSED increases in tuition or fees at least ten days prior to the public hearing.

(d) Final board action on changes in tuition or fees shall be taken by roll call vote. The procedural requirements of subdivisions (a), (b), (c) and (d) apply only to those changes in tuition or fees that require board approval.

6. Pursuant to section 35-115, submit a budget request for each institution under its jurisdiction that includes the estimated tuition and fee revenue available to support the programs of the institution as described in the budget request. The estimated available tuition and fee revenue shall be

based on the tuition and registration fee rates in effect at the time the budget request is submitted with adjustments for projected changes in enrollment as provided by the board.

7. Establish curriculums and designate courses at the several institutions which in its judgment will best serve the interests of this state.

8. Award such degrees and diplomas upon the completion of such courses and curriculum requirements as it deems appropriate.

9. Prescribe qualifications for admission of all students to the universities. For the purpose of determining the qualifications of honorably discharged veterans, veterans are those who served in the armed forces for a minimum of two years and who were previously enrolled at a university or community college in this state. No prior failing grades received by the veteran at the university or community college in this state may be considered.

10. Adopt any energy conservation standards promulgated by the department of administration for the construction of new buildings.

11. Employ for such time and purposes as the board requires attorneys whose compensation shall be fixed and paid by the board. Litigation to which the board is a party and for which self-insurance is not provided may be compromised or settled at the direction of the board.

12. Adopt annually an operating budget for each university equal to the sum of appropriated general fund monies and the amount of tuition,

registration fees and other revenues approved by the board and allocated to each university operating budget.

13. In consultation with the state board of education and other education groups, develop and implement a program to award honors endorsements to be affixed to the high school diplomas of qualifying high school pupils and to be included in the transcripts of pupils who are awarded endorsements. The board shall develop application procedures and testing criteria and adopt testing instruments and procedures to administer the program. In order to receive an honors endorsement, a pupil must demonstrate an extraordinary level of knowledge, skill and competency as measured by the testing instruments adopted by the board in mathematics, English, science and social studies. Additional subjects may be added at the determination of the board. The program is voluntary for pupils.

14. Require the publisher of each literary and nonliterary textbook used in the universities of this state to furnish computer software in a standardized format when software becomes available for nonliterary textbooks, to the Arizona board of regents from which braille versions of the textbooks may be produced.

15. REQUIRE UNIVERSITIES THAT PROVIDE A DEGREE IN EDUCATION TO REQUIRE COURSES THAT ARE NECESSARY TO OBTAIN A PROVISIONAL STRUCTURED ENGLISH IMMERSION ENDORSEMENT AS

Appendix N

PRESCRIBED BY THE STATE BOARD OF EDUCATION.

B The board shall adopt personnel rules. All nonacademic employees of the universities are subject to these rules except for university presidents, university vice-presidents, university deans, legal counsel and administrative officers. The personnel rules shall be similar to the personnel rules under section 41-783. The rules shall include provisions for listing available positions with the department of economic security, competitive employment processes for applicants, probationary status for new nonacademic employees, nonprobationary status on successful completion of probation and due process protections of nonprobationary employees after discharge. The board shall provide notice of proposed rule adoption and an opportunity for public comment on all personnel rules proposed for adoption.

C The Arizona board of regents may employ legal assistance in procuring loans for the institutions from the United States government. Fees or compensation paid for such legal assistance shall not be a claim upon the general fund of this state but shall be paid from funds of the institutions.

D The board shall approve or disapprove any contract or agreement entered into by the university of Arizona hospital with the Arizona health facilities authority.

E The board may adopt policies which authorize the institutions under its jurisdiction to enter into employment contracts with nontenured

employees for periods of more than one year but not more than five years. The policies shall prescribe limitations on the authority of the institutions to enter into employment contracts for periods of more than one year but not more than five years, including the requirement that the board approve the contracts.

F The board may adopt a plan or plans for employee benefits which allow for participation in a cafeteria plan that meets the requirements of the United States internal revenue code of 1986.

G The board may establish a program for the exchange of students between the universities under the jurisdiction of the board and colleges and universities located in the state of Sonora, Mexico. Notwithstanding subsection A, paragraph 5 of this section, the program may provide for in-state tuition at the universities under the jurisdiction of the board for fifty Sonoran students in exchange for similar tuition provisions for up to fifty Arizona students enrolled or seeking enrollment in Sonoran colleges or universities. The board may direct the universities to work in conjunction with the Arizona-Mexico commission to coordinate recruitment and admissions activities.

H Subsection A, paragraph 5, subdivision (a), (b), (c) and (d) of this section do not apply to fee increases that are set by individual universities and that do not require approval by the Arizona board of regents before the fee increase becomes effective.

Appendix N

Sec. 6. Joint legislative committee on school maintenance and operations funding

A A joint legislative committee on school maintenance and operations funding is established consisting of:

1. Four members of the house of representatives, no more than two of whom shall be members of the same political party. The leader of each of the two major parties of the house of representatives shall appoint two members to serve on the joint legislative committee. Members appointed pursuant to this paragraph shall be selected within thirty days of the effective date of this act. The speaker of the house of representatives shall select one of the members appointed pursuant to this paragraph to co-chair the joint legislative committee.

2. Four members of the senate, no more than two of whom shall be members of the same political party. The leader of each of the two major parties of the senate shall appoint two members to serve on the joint legislative committee. Members appointed pursuant to this paragraph shall be selected within thirty days of the effective date of this act. The president of the senate shall select one of the members appointed pursuant to this paragraph to co-chair the joint legislative committee.

B The committee shall:

1. Evaluate and make specific recommendations on school district and charter school maintenance and operations funding,

including specific recommendations concerning group A and group B weights, with emphasis on the group B weight for English learners and the funding formula for rural and small schools.

2. Evaluate and make specific recommendations on English learner programs, including, but not limited to the following:

(a) The manner in which structured English immersion programs and bilingual education programs are implemented in this state.

(b) The additional requirements for school districts and charter schools necessitated by the ballot initiative that enacted the provisions of title 15, chapter 7, article 3.1 and the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

(c) The identification of which school districts and charter schools have significantly high reclassification rates and test scores for English learners.

(d) The incremental amount per student that school districts and charter schools spend on each English learner from any and all funding sources.

(e) Whether additional compensatory instruction monies that are made available should be distributed to parents of English learners or the school district or charter school.

(f) The current use of federal monies for English learner programs and the future

appropriate use of federal monies for English learner programs.

(g) The extent to which school districts and charter schools are in compliance with state and federal laws relating to English learner programs, including the consent order dated June 30, 2000 in the Flores v .Arizona litigation.

3. Review a form developed by the state board of education to be used by all school districts and charter schools for use at the beginning of the 2003-2004 school year for parental waivers pursuant to section 15-753, Arizona Revised Statutes.

4. Review a parent or legal guardian English learner notification and consent form developed by the state board of education to be used by all school districts and charter schools for use at the beginning of the 2002-2003 school year. The form shall be completed annually by either school district or charter school personnel and the classroom teacher within thirty days of the receipt of the language proficiency test results. The form shall be signed and dated by both the primary classroom teacher and the student's parents or legal guardian. The signed and completed form shall be kept on file by the school district or charter school. The form shall not exceed one page in length and shall contain the following information:

(a) The pupil's name.

(b) The reasons that the pupil has been placed in a language acquisition program.

(c) A check box that indicates whether the pupil has been placed in a structured English immersion program or a bilingual education program.

(d) A list of the criteria that will be used to determine if the pupil has achieved English proficiency.

5. Recommend to the state board of education:

(a) Structured English immersion guidelines and methodologies to be used by school districts and charter schools.

(b) Guidelines for the courses required pursuant to section 15-1626, Arizona Revised Statutes, as amended by this act, pertaining to provisional structured English immersion endorsements.

(c) Guidelines and requirements for structured English immersion certification of teachers.

(d) Other sources of in-service teacher training.

6. Submit a report of its findings, recommendations and proposed legislation to the president of the senate, the speaker of the house of representatives and the governor on or before December 1, 2004. The committee shall provide a copy of the report to the secretary of state and the director of the Arizona state library, archives and public records.

C The committee may instruct the auditor general to conduct and complete any and all audits that the committee deems necessary. The auditor general shall report to the committee the results of any audits conducted pursuant to this subsection.

D The committee may utilize the services and staff of the department of education, the auditor general, legislative council and the legislature.

Sec. 7. Delayed repeal

Section 6 of this act, relating to the joint legislative committee on school maintenance and operations funding, is repealed from and after December 31, 2004.

Sec. 8. Cost study of ELL group B weight; report

A The legislative council shall select and contract with a private entity to conduct a cost study of the group B weight for English learners. The cost study shall determine the actual cost of complying with all state and federal laws relating to language acquisition programs and the current use of federal monies for English learner programs and the future appropriate use of federal monies for English learner programs. The cost study shall reflect the requirements listed in the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

B The joint legislative committee on school maintenance and operations funding shall determine the scope and content of the cost study and the school districts and charter schools that will be selected to participate in the cost study. No fewer

than fifty per cent of the school districts and charter schools that are selected to participate in the cost study shall be from school districts and charter schools with the highest number of pupils who are classified as English learners.

C Legislative council shall award the contract to conduct the cost study to the selected private entity by August 1, 2002. The private entity shall complete the cost study and submit its final report to the joint legislative committee, the governor, the president of the senate and the speaker of the house of representatives on or before August 1, 2004 and shall provide a copy of this report to the secretary of state and the director of the Arizona state library, archives and public records.

Sec. 9. Effective date

Section 15-943, Arizona Revised Statutes, as amended by this act, is effective from and after June 30, 2002.

Sec. 10. Appropriation; purpose; exemption

A The sum of $500,000 is appropriated from the state general fund in fiscal year 2002-2003 to legislative council in order to carry out the purposes of section 6 of this act, relating to the joint legislative committee on school maintenance and operations funding and section 8 of this act, relating to the cost study of ELL group B weight.

B The appropriation made in subsection A of this section is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations, except that all monies

remaining unexpended and unencumbered on December 2, 2004 revert to the state general fund.

Sec. 11. Appropriations; purpose; exemption

A The sum of $4,500,000 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education for distribution to school districts and charter schools to pay teachers for reimbursement for the successful completion of courses or other training prescribed in section 15-756, subsection A, paragraph 5, Arizona Revised Statutes, as added by this act, that are required to acquire a structured English immersion endorsement or a bilingual education endorsement as prescribed by rules adopted by the state board of education.

B The sum of $4,500,000 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education for distribution to school districts and charter schools to pay teachers for reimbursement for the successful completion of courses or other training prescribed in section 15-756, subsection A, paragraph 5, Arizona Revised Statutes, as added by this act, that are required to acquire a structured English immersion endorsement or a bilingual education endorsement as prescribed by rules adopted by the state board of education.

C The sum of $4,500,000 is appropriated from the state general fund in fiscal year 2004-2005 to the department of education for distribution to school districts and charter schools to pay teachers for reimbursement for the successful completion of courses or other training prescribed in section 15-756, subsection A, paragraph 5, Arizona Revised

Statutes, as added by this act, that are required to acquire a structured English immersion endorsement or a bilingual education endorsement as prescribed by rules adopted by the state board of education.

D If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general fund appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

E The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 12. Appropriations; purpose; exemption

A The sum of $3,080,000 is appropriated from the state general fund in fiscal year 2001-2002 to the department of education for distribution to school districts and charter schools for compensatory instruction for English learners. Eligible school districts and charter schools shall receive an amount for every English learner who is not making adequate academic progress as prescribed by rules adopted by the state board of education. The per pupil amount shall be determined by dividing the appropriation by the number of English learners in this state who are not making adequate academic progress. In order to be eligible for monies appropriated pursuant to this section, a school district or charter school must demonstrate to the

department of education that it has established a satisfactory compensatory instruction program. School districts and charter schools that receive monies pursuant to this section shall only spend these monies on compensatory instruction. A school district or charter school shall not receive more than one hundred dollars per English learner from monies distributed pursuant to this section.

B The sum of $5,500,000 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education for distribution to school districts and charter schools for compensatory instruction for English learners. Eligible school districts and charter schools shall receive an amount for every English learner who is not making adequate academic progress as prescribed by rules adopted by the state board of education. The per pupil amount shall be determined by dividing the appropriation and any monies unexpended in the previous year by the number of English learners in this state who are not making adequate academic progress. In order to be eligible for monies appropriated pursuant to this section, a school district or charter school must demonstrate to the department of education that it has established a satisfactory compensatory instruction program. School districts and charter schools that receive monies pursuant to this section shall only spend these monies on compensatory instruction. A school district or charter school shall not receive more than one hundred dollars per English learner from monies distributed pursuant to this section.

Appendix N

C The sum of $5,500,000 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education for distribution to school districts and charter schools for compensatory instruction for English learners. Eligible school districts and charter schools shall receive an amount for every English learner who is not making adequate academic progress as prescribed by rules adopted by the state board of education. The per pupil amount shall be determined by dividing the appropriation and any monies unexpended in the previous year by the number of English learners in this state who are not making adequate academic progress. In order to be eligible for monies appropriated pursuant to this section, a school district or charter school must demonstrate to the department of education that it has established a satisfactory compensatory instruction program. School districts and charter schools that receive monies pursuant to this section shall only spend these monies on compensatory instruction. A school district or charter school shall not receive more than one hundred dollars per English learner from monies distributed pursuant to this section.

D The sum of $5,500,000 is appropriated from the state general fund in fiscal year 2004-2005 to the department of education for distribution to school districts and charter schools for compensatory instruction for English learners. Eligible school districts and charter schools shall receive an amount for every English learner who is not making adequate academic progress as prescribed by rules adopted by the state board of education. The per

pupil amount shall be determined by dividing the appropriation and any monies unexpended in the previous year by the number of English learners in this state who are not making adequate academic progress. In order to be eligible for monies appropriated pursuant to this section, a school district or charter school must demonstrate to the department of education that it has established a satisfactory compensatory instruction program. School districts and charter schools that receive monies pursuant to this section shall only spend these monies on compensatory instruction. A school district or charter school shall not receive more than one hundred dollars per English learner from monies distributed pursuant to this section.

E If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general find appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

F The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 13. Appropriations; purpose; exemption

A The sum of $1,500,000 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education for distribution to school districts and charter schools to pay for

instructional materials and supplies for language acquisition programs. A school district or charter school shall not receive more than ten dollars per English learner from monies appropriated pursuant to this section.

B The sum of $1,500,000 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education for distribution to school districts and charter schools to pay for instructional materials and supplies for language acquisition programs. A school district or charter school shall not receive more than ten dollars per English learner from monies appropriated pursuant to this section.

C The sum of $1,500,000 is appropriated from the state general fund in fiscal year 2004-2005 to the department of education for distribution to school districts and charter schools to pay for instructional materials and supplies for language acquisition programs. A school district or charter school shall not receive more than ten dollars per English learner from monies appropriated pursuant to this section.

D If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general fund appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

Appendix N

E The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 14. Appropriations; purpose; exemption

A The sum of $158,050 is appropriated from the state general fund in fiscal year 2001-2002 to the department of education to pay for 4.5 FTE positions in order to monitor language acquisition programs as prescribed in section 15-756, Arizona Revised Statutes, as added by this act, and as prescribed in the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

B The sum of $316,095 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education to pay for 4.5 FTE positions in order to monitor language acquisition programs as prescribed in section 15-756, Arizona Revised Statutes, as added by this act, and as prescribed in the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

C The sum of $316,095 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education to pay for 4.5 FTE positions in order to monitor language acquisition programs as prescribed in section 15-756, Arizona Revised Statutes, as added by this act, and as prescribed in the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

D The sum of $316,095 is appropriated from the state general fund in fiscal year 2004-2005

to the department of education to pay for 4.5 FTE positions in order to monitor language acquisition programs as prescribed in section 15-756, Arizona Revised Statutes, as added by this act, and as prescribed in the consent order dated June 30, 2000 in the Flores v. Arizona litigation.

E If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general fund appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

F The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 15. Appropriations: purpose: exemption

A The sum of $3,060,000 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education for deposit in the English learner classroom personnel bonus fund established by section 15-943.04, Arizona Revised Statutes, as added by this act.

B The sum of $3,060,000 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education for deposit in the English learner classroom personnel bonus fund established by section 15-943.04, Arizona Revised Statutes, as added by this act.

C The sum of $3,060,000 is appropriated from the state general fund in fiscal year 2004-2005 to the department of education for deposit in the English learner classroom personnel bonus fund established by section 15-943.04, Arizona Revised Statutes, as added by this act.

D If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general fund appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

E The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 16. Appropriations; purpose; exemption

A The sum of $750,000 is appropriated from the state general fund in fiscal year 2002-2003 to the department of education to assist school districts and charter schools in the implementation of a four year comprehensive accountable literacy pilot program that guarantees all children entering the system in kindergarten will be successful at reading, writing and speaking English at grade level by the end of the third grade. The pilot program shall include a reading certification for teachers, a comprehensive in school curriculum, an ongoing process for monitoring and supporting teachers, an ongoing process for monitoring pupils, an extended

day and an extended year intervention component linked to the in-school curriculum.

B The sum of $750,000 is appropriated from the state general fund in fiscal year 2003-2004 to the department of education to assist school districts and charter schools in the implementation of a four year comprehensive accountable literacy pilot program that guarantees all children entering the system in kindergarten will be successful at reading, writing and speaking English at grade level by the end of the third grade. The pilot program shall include a reading certification for teachers, a comprehensive in-school curriculum, an ongoing process for monitoring and supporting teachers, an ongoing process for monitoring pupils, an extended day and an extended year intervention component linked to the in-school curriculum.

C The sum of $750,000 is appropriated from the state general fund in fiscal year 2004-2005 to the department of education to assist school districts and charter schools in the implementation of a four year comprehensive accountable literacy pilot program that guarantees all children entering the system in kindergarten will be successful at reading, writing and speaking English at grade level by the end of the third grade. The pilot program shall include a reading certification for teachers, a comprehensive in-school curriculum, an ongoing process for monitoring and supporting teachers, an ongoing process for monitoring pupils, an extended day and an extended year intervention component linked to the in-school curriculum.

D If federal monies are received by the department of education for the specific purposes for which monies are appropriated pursuant to this section, the department of education shall revert the portion of the state general fund appropriation received equal to the federal dollars received for this purpose in the year that federal monies are received, if the reversion is consistent with federal law.

E The appropriations made in this section are exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 17. Intent

A It is the intent of the legislature to identify and fund the most effective and cost efficient English language acquisition programs for our public education institutions. The legislature has held extensive hearings and taken hours of testimony on this issue. Those hearings show that there is a significant array of teaching programs and instructional models currently in place for teaching non-English speaking students. Additionally, there is limited data and few reports of results to help identify a menu of teaching programs that would allow those students to master the standard academic curriculum. It is also apparent that one teaching model will not effectively and efficiently satisfy the needs of all educational institutions.

B With the information currently available, the legislature finds the level of funding in this legislation to be reasonable. The legislature recognizes that further study and evaluation are

necessary to determine whether the funding for this program should be adjusted. Therefore, the legislature is establishing a joint legislative committee and providing the necessary funds to evaluate the various teaching programs in place or available, recommend programs for successful English language acquisition programs of non-English speaking students in Arizona schools and determine whether the level of funding associated with such programs should be adjusted. The legislature is requiring the study to be concluded within a strict, yet realistic timeline of two years and the legislature expects legislative review during the third year. During the study interim the legislature has chosen the Nogales unified school district cost study prepared by the Arizona department of education as the basis for the English learner (ELL) group B weight selected. The legislature evaluated several areas of the cost study that indicated the Nogales number might not be representative of average costs across the state. In those areas the legislature added supplemental funding in an effort to better balance the ELL group B weight.

C It remains the intent of the legislature to identify and fund effective and cost efficient English language acquisition programs for schools in Arizona. It is important to remember that parents of English learners want their children to be proficient in English. The legislature is trying to find the best way to honor that desire.

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, a minor child, et al.,	)	No. CV92-596-TUC-RCC
Plaintiffs,	)	
vs.	)	
STATE OF ARIZONA, et al.,	)	
Defendants.	)	

Excerpt from Financial Report of Richard Valdivia

* * *

During [sic] same period that Arizona's Title I funds have increased, the Title I allocation for the Nogales Unified School District has increased from $1,849,858 to $2,953,814. Since the fiscal year ending June 30, 2002, NUSD, has carried over at least $250,000, in unused Title I funds each year. For the most recent completed fiscal year ending June 30, 2006, NUSD, has an estimated $525,000, in unused Title I funds. Additionally, current completion reports indicate that NUSD will be carrying over approximately $59,667 in unused Title II Funds and $143,465 in unused Title III funds.

Appendix N

Nogales Unified School District has significant latitude in how it uses the funds made available to it. NUSD could set aside funds to assist ELLs in a district wide program and allocate Title I funds to each school site for its schoolwide program in accordance with Title I regulations. The decision as to how their Title I funds are used rest with NUSD. In an LEA, like NUSD, with an ELL population approaching 50% of the population it would not be unreasonable to assume their needs would be considered in developing their schoolwide programs.

During the same period NUSD funding under Title III of NCLB has increased from $261,818 in 2003 to an estimated $322,900 in 2007. At the same time the number of ELL students reported by NUSD has decrease [sic] from 3923 in 2003 to 2474 in 2007. Accordingly per pupil funding, for Title III, has increased from $67 in 2003 to $121 in 2007. At the same time NUSD funding under the Title I program has gone from $1,644,029 in 2000 to $2,958,814 in 2007. At the same time the ADM of NUSD has decreased from 5989 to 5865. Accordingly per pupil funding for Title I, ignoring carryover of unused funds, has increased from $439 in 2000 to $597 in 2007.

In addition to increases in federal programs and competitive state programs NUSD has experienced significant growth in its equalization formula funding. In the Findings of Fact and Conclusions of Law, issued January 24, 2000, under findings of fact number 19, it was stated that NUSD did not have an override. In fact NUSD has now had an override in

place beginning with the 2001 year. The table below shows the amount of the override by fiscal year.

NUSD M&O OVERRIDE	
FY 2001	$895,891
FY 2002	$934,373
FY 2003	$947,901
FY 2004	$967,388
FY 2005	$974,800
FY 2006	$1,554,265
FY 2007	$1,674,407

The funds obtained from the M&O override are available for almost any educational purpose which NUSD chooses to apply them to. In addition to receiving additional funds from the override NUSD has received other significant increases in their M&O budget since 2000.

As can be seen from the chart below the M&O budget of NUSD has increased over each of the last eight years while the numbers of students attending NUSD has decreased.

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